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In the

Supreme Court of the United States

ANDREW MITCHELL, Jr., & GEORGE A. SEAVER,
Petitioners,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

DOES A DUE PROCESS VIOLATION OCCUR WHERE THE PERFORMANCE OF MILITARY APPELLATE JUDGES IS SUBJECT TO PERIODIC EVALUATIONS BY THE JUDGE ADVOCATE GENERAL OF THE NAVY, THEREBY APPEARING TO GIVE THEM A DIRECT, PERSONAL, SUBSTANTIAL PECUNIARY INTEREST IN THE OUTCOME OF THE CASES THEY REVIEW?

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Mitchell*, 39 M.J. 131, (C.M.A. 1994), is reprinted as Appendix A at Pet. App. 1a. The published decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Mitchell*, 37 M.J. 903 (N.M.C.M.R. 1993) (*en banc*), is reprinted as Appendix B at Pet. App. 63a. The decision of the United States Court of Military Appeals, *United States v. Seaver*, __ M.J. __, No. 93-1444/NA (C.M.A. June 21, 1994), is reprinted as Appendix C at Pet. App. 138a. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Seaver*, No. 92-0537, slip op. (N.M.C.M.R. June 28, 1993), is reprinted as Appendix D at Pet. App. 139a.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review in petitioner Mitchell's case on April 29, 1994, and in petitioner Seaver's case on June 21, 1994. 28 U.S.C. § 1259(3) (1984) provides jurisdiction in these cases and entitles petitioners to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Article 37, 10 U.S.C. § 837, and Rule for Courts-Martial 902, are set forth in Pet. App. at 138a.

STATEMENT OF THE CASE

This petition questions the independence of the judges of the Navy-Marine Corps Court of Military Review in light of the direct, personal, substantial pecuniary interest created by the fitness reports they currently receive. Although civilians are authorized to sit as judges on that court, none currently do, and all of the judges who reviewed petitioners' cases were commissioned officers in the Navy and Marine Corps.

As military officers the members of the court receive annual fitness reports which are used as a basis for promotion, future assignments and retention through the Selective Early Retirement Board procedure. These reports are prepared and signed by the Judge Advocate General of the Navy with input from the Assistant Judge Advocate General (Military Justice). This is akin

to having state appellate court judges evaluated annually by the State Attorney-General and having those evaluations used by the same Attorney-General to determine whether or not those judges are retained in their position, or are removed, or sent to early retirement. Accordingly, petitioner is denied his due process rights under the Fifth Amendment as well as his rights to review by an impartial tribunal under Rule for Courts-Martial § 902. Manual for Courts-Martial, United States, 1984. Rule for Courts-Martial § 902 [hereinafter R.C.M.].

1. *Institutional Framework.*

Within the military justice system, Congress has established a trial court and two levels of appellate courts: the Court of Military Review and the Court of Military Appeals. Judges of the Court of Military Review are appointed by the Judge Advocate General and serve at his pleasure. Review by that court is a right in all cases where an accused receives more than one year of confinement, death, or a punitive discharge. Judges of the Court of Military Appeals are civilians appointed by the President, serving for a term of 14 years. Appeallate review is discretionary with that court. Petitioner's case addresses only the Court of Military Review.

As a military officer, each active duty judge on the Court of Military Review receives an annual officer fitness report which grades his performance and ranks him against other officers of the same paygrade serving under the same reporting senior. For all members of the court the reporting senior is the Judge Advocate General of the Navy. Marine Corps officers serving on the court have an additional reviewing officer, currently the Assistant Commandant of the Marine Corps. Navy judges, with the exception of the Chief Judge, are ranked against each other. Marine Corps judges are likewise ranked against each other.

At the time petitioner's case was reviewed, Marine Corps officers were also ranked against the Assistant Judge Advocate General for Military Justice who prepared the draft reports including proposed rankings. Following the decision of the

Court of Military Review which strongly criticized this practice, the Assistant Judge Advocate General's role was changed and he is no longer ranked against the judges. Recognizing the inherent conflict, the present Assistant Judge Advocate General (Military Justice) has recused himself from the fitness reporting process and does not provide input for the judges reports.

2. *The Petitioners*

a. Petitioner Mitchell was tried before a military judge at a special court-martial and was convicted, in accordance with his guilty pleas, of wrongfully disposing of government property, a violation of 10 U.S.C. §908 (1984); stealing government property, a violation of 10 U.S.C. §921 (1984); and indecent assault and indecent language, violations of 10 U.S.C. §934 (1984). He was sentenced to be reduced to the paygrade of E-1, to forfeit $500 pay per month for four months and to receive a bad conduct discharge. The convening authority approved the sentence as adjudged.

The Navy-Marine Corps Court of Military Review affirmed petitioner's conviction in a published, *en banc* decision where petitioner challenged the court's ability to review his case based upon an actual or apparent lack of judicial independence. *United States v. Mitchell*, 37 M.J. 903 (N.M.C.M.R. 1993). Petitioner filed a petition for grant of review on June 1, 1993, before the Court of Military Appeals, raising the judicial independence question, noting the serious concerns with the system expressed by the members of the lower court. On April 29, 1994, the Court of Military Appeals, while noting those concerns, affirmed petitioner's court-martial conviction, thereby allowing him to seek redress before this Court on this important issue of law. *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994).

b. Petitioner Seaver was tried before a military judge at a general court-martial and was convicted, contrary to his pleas, of two specifications of indecent acts with a child under 16 years of age, a violation of 10 U.S.C. §934 (1984). Petitioner

Seaver was also convicted, in accordance with his guilty pleas, of sodomy with a child under 16 years of age, a violation of 10 U.S.C. §925 (1984); and three specifications of indecent acts with a child under 16 years of age, a violation of 10 U.S.C. §934 (1984). This was his his first offense, he had an otherwise excellent record of 24 honorable years of prior service. Nonetheless, he was sentenced to a dismissal from the naval services, confinement of 18 years, and total forfeitures. The convening authority denied clemency and approved the sentence as adjudged.

The Navy-Marine Corps Court of Military Review affirmed petitioner's conviction in a unpublished decision where petitioner challenged, *inter alia*, the court's ability to review his case based upon an actual or apparent lack of judicial independence. *United States v. Seaver*, No. 92-0537, (N.M.C.M.R. June 28, 1993). Petitioner also raised issues of erroneous evidentiary rulings, ineffective assistance of counsel and sentence appropriateness. Petitioner filed a petition for grant of review on August 31, 1993, before the Court of Military Appeals, raising the judicial independence question. On June 21, 1994, the Court of Military Appeals affirmed petitioner's court-martial conviction. *United States v. Seaver*, __ M.J. __, No. 93-1444/NA (C.M.A. June 21, 1994).

REASON FOR GRANTING THE WRIT

Although it is clear that members of the military may be subject to some restrictions upon their constitutional rights that are not applicable to civilians, certain guarantees under the Due Process Clause and the inherent right to an impartial forum are not among them. *See, e.g., Parker v. Levy*, 417 U.S. 733 (1974). "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Weiss v. United States*, ___ U.S. ___, 114 S. Ct. 752, 769, (1994) (Ginsburg, J., concurring). The military judicial system cannot guarantee that these safeguards and protections will not be lost when the judges

reviewing cases on appeal are under a cloud of suspicion as to a possible lack of independence. "[J]ustice, must satisfy the appearance of justice" if there is to be any confidence in the system. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

I. The reasonable observer is the appropriate standard by which to judge an appearance under the Due Process Clause, not the reasonable military judge as applied by the Court of Military Appeals.

Beginning with its decision in *Tumey v. State of Ohio*, 273 U.S. 510 (1927), this Court has consistently held that a criminal defendant is denied due process of law when the judge in his case has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him. *Id.* at 523. In acknowledging that there would be mayors who **could** retain their impartiality as judges, Chief Justice Taft stated that:

> the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would **offer a possible temptation to the average man** as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532 (emphasis added). This language was utilized by this Court again in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972), and more recently in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ____, 113 S. Ct. 2264, 2277 (1993). This Court has further held that, "'[J]ustice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who

have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Concrete Pipe*, 113 S. Ct. at 2277, (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)). The question becomes one of whose viewpoint is utilized in determining whether that appearance is satisfied. Petitioner submits that it is the average reasonable "man" observing the system who must be satisfied if justice is to be done.

Relying on the 5th Circuit Court of Appeals decision in *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990), the Court of Military Appeals elected to view the system through the eyes of the reasonable judge. By placing undue emphasis upon the fact that these judges are also military officers, the court created an even more limited test–that of the reasonable **military** judge. By taking such a restrictive view of the due process protections, the court inappropriatly restricted the scope of review. This creates a new, narrower scope of due process rights.

Nothing within this Court's opinions discusses the view of the average reasonable **mayor** or **administrator**. Chief Justice Taft's use of the phrase "average man" together with the requirement that the "appearance of justice" be satisfied is consistent with petitioner's position that the vantage point from which that appearance must be weighed is that of an **observer** of the system rather than a **participant**. *Cf. Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847, 865 n.12, (1988) ("[T]his concern has constitutional dimensions.... A finding by another judge...is unlikely to significantly quell **the concerns of the skeptic**." (emphasis added)).

If the test is the view of the **reasonable military judge**, then the person determining the validity of the system is one who has a stake in its continuation; and one who may be intimidated into supporting the system by the very factors which created the appearance problem in the first place. This "fox guarding the hen house" approach can do nothing to enhance the appearance that justice is being done. As this Court stated in *Liljeberg*, "people who have not served on the bench are often

utilizing the reasonable **observer** of the system, the person Judge Wiss described as "neither irrationally jaundiced against the fairness of the military justice system nor, just as importantly, dogmatically indoctrinated in support of it," one can truly determine whether the appearance of justice is satisfied. Pet. App. 45a.

II. When the proper standard is applied in reviewing all of the relevant factors, a reasonable observer would find that the judges of the Navy-Marine Corps Court of Military Review lack the necessary judicial independence required by the Due Process Clause and Rule for Courts-Martial 902(a).

A. A review of all of the factors available to the reasonable observer creates a serious question as to the apparent independence of the Court of Military Review Judges.

The majority opinion of the Court of Military Appeals limited its assessment to four facts or circumstances of which a reasonable person would be aware when viewing the current system of justice. This assessment is inappropriate as it not only fails to consider all available factors, but takes an unrealistic view of those factors which were considered.

The first factor is that the reasonable person is "assessing the impact or possible impact. . .on a *military* judge." Pet. App. 35a (emphasis added). The key element focussed on by the court was the fact that as a military officer, the judge has sworn to do his duty under the law. No explanation is offered as to why a second oath, similar to the judicial oath would endow the judge with greater resistance to temptation. As Judge Wiss noted, however, "Such chest-pounding adds little to the balance. A similar type of claim that seems to suggest some sort of inherent integrity may be made of most any judge in most any judicial system in this country." Pet. App. 46a. Further, it is that very "militariness" makes this factor less positive than the court wishes to assume.

As this Court noted in *Weiss*, "the position of military judge is less distinct from other military positions than the office of full-time civilian judge is from other offices in civilian society." *Weiss*, 114 S. Ct. at 760. This recognizes that the emphasis in the position of military judge seems to be on the "military" aspects. The concern that this adds to the equation is that these judges have had 15 to 20 or more years of **military** service prior to assuming their current position. Many years coming up through the ranks have not only trained them to recognize the significance of fitness reports, but also indoctrinated them in the military requirements of obedience to superiors and fulfillment of the "Navy mission." As this Court has noted:

> to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps [citations omitted]. The essence of military service 'is the subordination of the desires and interest of the individual to the needs of the service' [citations omitted]. . . . [T]he habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.

Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986).

The oath on which the Court of Military Appeals placed such great reliance not only serves to foster the environment in which the "habit of immediate compliance" can become ingrained, but it also obligates these officers to perform duties which could clearly be seen as prosecutorial. "Commissioned officers, for example, have the power and duty to 'quell quarrels, frays and disorders among persons subject to [the UCMJ] and to apprehend persons subject to [the UCMJ] who take part therein.'" *Weiss*, at 114 S. Ct. at 759 (quoting Article 7(c), UCMJ, 10 U.S.C. § 807(c) (1984)). While appellant does not suggest that these functions are inappropriate for a military officer, he does maintain that a long history of performing such

duties as well as the formation of a "habit" of obedience must be considered when assessing the question of appearance of independence. Many of these officers, particularly the Marine Corps officers, may have had significant periods of service totally unrelated to military justice, and it is unreasonable to overlook the training and duties which helped shape them for more than a decade prior to their assignment to the court.

The next factor that the court considered is the rulings in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), and *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991), in which the court held that fitness reports could not take into account a judge's findings or sentencing decisions. The court stated that in the absence of evidence to the contrary, it would assume that the JAG and AJAG know the law and would follow it.
This position fails, however, to account for the concern noted above as to what criteria are utilized to evaluate an officer whose **sole military duty** for the given period is to make decisions regarding the validity of findings and sentencings handed down at courts-martial. This was clearly a serious concern of the members of the Court of Military Review, the very people who are affected.

A third factor upon which the court relied to find no appearance was the availability to a judge of "viable remedies to protect himself from untoward influence of the Judge Advocate General or his subordinate." Pet. App. 36a. In addition to the circularity of this argument noted by Judge Wiss, in that a judge with the moral courage and intestinal fortitude to avail himself of those remedies is likely to also be able to resist temptation, and vice versa, the Court of Military Review noted a more serious problem. Pet. App. 48a. In the majority opinion the Court of Military Review, after noting the impact even subtle distinctions in grades and narratives may have held that, "For this reason, we place little reliance on these means of redress as a safety net against the improper use of a fitness report." Pet. App. 91a. The reliance by the Court of Military Appeals upon the availability of administrative remedies seems misplaced when the very judges who would need to avail them-

selves of the remedies lack any confidence in their utility.

The final factor relied upon by the Court of Military Appeals was the failure of any of the judges of the Court of Military Review to express a personal view that either the JAG or AJAG was biased and that petitioner had failed to show any actual bias on the part of any of the judges in his case. As Judge Wiss noted, if either of these factors did exist then recusal would be clearly mandated but the lack of proof of actual bias "is not much affirmative comfort." Pet. App. 48a-49a. Additionally, this view by the majority appears to require petitioner to show actual harm in order to prevail and as this Court ruled in *Ward*, "If this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little." *Ward*, 409 U.S. at 83.

The majority opinion fails to take into account other factors which would be available for consideration by a reasonable observer. Factors such as former Judge Rubens' perception that his fitness reports **were affected** by his participation in the *Billig* and *Carlucci* opinions; the case of *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991), where the Deputy Judge Advocate General of the Navy and another senior Judge Advocate considered the assignment of a trial judge in the case based upon sentencing practices; and the case of *United States v. Larsen*, No 92-1621 (N.M.C.M.R. May 26, 1994), currently pending appeal to the Court of Military Appeals. In *Larsen*, the court was being asked to overturn rulings of then Military Judge, now AJAG, Colonel Ouelette as well as to find error in post-trial delay committed by the current Assistant Commandant of the Marine Corps, the reviewing officer for the fitness reports of the Marine Corps judges on the court. The findings and sentence were affirmed in a 3-0 opinion.

Lastly, the position of the Court of Military Appeals that there is no possiblity that a reasonable person would be concerned with the current system is directly contradicted by the repeated expressions of concern voiced throughout the opinions of both courts, by all involved. The various opinions from the Court of

Military Review are replete with expressions of concern for the current system by the various members of the court. With regard to the AJAG's involvement in the process the court stated that "arguably a reasonable observer may conclude that [his involvement] is inappropriate." Pet. App. 95a. "We acknowledge that such an appearance may exist." Pet. App. 95a, n14. The court also invited the JAG's attention to additional concerns with the system which they noted could contribute to "an unhealthy appearance." *Id.* Judge Mollison concluded that,

> Unless the rating and ranking of appellate military judges is accomplished. . .based on clearly stated criteria. . .(and only with the assistance of persons having no arguable interest, . . .) military appellate review will not enjoy the confidence in its integrity and independence that Congress and the public require. . . . The current rating/ranking system breeds claims of subtle, systemic command influence no less worthy of concern. . . . [N]ow is the time to remove the lingering doubts the current rating/ranking system fosters.

Pet. App. 106a-107a. Judge Reed likewise expressed grave concerns over the lack of clear, objective, criteria when he stated that "In the absence of specific objective criteria, '**an objective, disinterested observer** fully informed of the facts **would entertain a significant doubt** that justice was being done' **and would perceive an appearance of command influence.**" Pet. App. 130a (emphasis added).

It is clear that these concerns were shared, in part, by members of the Court of Military Appeals, and at a minimum were noted in the opinions. Judge Wiss was clearly concerned as he specifically quoted portions of the lower court's opinion where the judges noted appearance problems. He also chose to write separately, dissenting in part from the majority, because he was not satisfied with the majority's cavalier

dismissal of problems which he agreed could lead a reasonable observer to question the system. The majority opinion states that "it is obvious to us that *the judges of the Navy-Marine Corps Court of Military Review, . . .*are concerned about the fairness of their treatment as professional military officers. We sense dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system. . . ." and conclude that, "the relief desired *by the Navy appellate military judges* must come by way of legislation." Pet. App 37a and 40a. Judge Cox states that he, "like [his] sister and brothers, doubt[s] the services' wisdom in leaving themselves open **to the inevitable charge** that judges are retained in service, promoted in grade, and given future assignments, at least in part, on the basis of some higher-up's approval of their performance as a judge." Pet. App 43a (emphasis added). Petitioner is left to wonder how nine officers can be concerned with, and be desirous of some form of relief from, that system, and how charges of influence could be "inevitable," if no reasonable observer would have a doubt as to the integrity of that system.

In sum, virtually every appellate judge knowledgeable about the system expressed serious concern about the appearance of unfairness and the potential for abuse. These observations alone create the type of appearance which violates due process and has been condemned by this Court in *Tumey, Ward,* and their progeny.

B. Fitness reports do constitute a direct, personal, substantial, pecuniary interest triggering both the Due Process Clause and the recusal requirements of R.C.M. 902.

"The lifeblood of any officer's career is his efficiency [fitness] report." Pet. App. 79a (quoting *United States v. Hubbard,* 20 C.M.A. 482, 485, 43 C.M.R. 322, 325 (1971)). In the opening message accompanying the issuance of the Marine Corps' "User's Guide - How to Write a Fitness Report," (Marine Corps, NAVMC 2794, Fitness Report-User's Guide, June 23, 1986 [hereinafter cited at NAVMC 2794]), then Commandant, General P.X. Kelley said, "[t]he preparation and submission of

fitness reports are not merely administrative requirements: they are leadership responsibilities . . . to our Country, to our Corps, to our Marines, and to their families. **I know of no more important document in our Marine Corps.**" NAVMC 2794, introduction (emphasis added).

Fitness reports are utilized for promotion, retention and future assignments. As Judge Reed of the Court of Military Review noted in his opinion:

> Some may argue that the only impact that a fitness report has on a judge is whether a judge makes flag or general officer rank. More is at stake than that. Junior judges hope for a coveted follow-on tour; O-5's hope to make O-6 (although there are no O-5's on this Court today there have been in the past and the Army routinely assigns O-5's to its Court); O-6's hope to avoid involuntary selective early retirement if they are not ready to retire; Marine O-6's may seek the AJAG (Military Justice) billet which in the recent past has allowed an O-6 to retire as an O-7; etc.

Pet. App. 128a, n21.

Fitness reports are a particularly potent weapon due to the extreme impact which subtle distinctions may impose in the eyes of a reviewing board. When all members of a given group receive the same grades in specific areas, the commentary becomes the crucial deciding factor. This is supported by Judge Freyer's opinion in this case in which he notes that the comments contained in the narrative section of a fitness report can be made "virtually inscrutable." Pet. App. 104a. He continues:

> As I pointed out in the *Mabe* [30 M.J. 1254 (N.M.C.M.R. 1990)] [N] concurrence:

> Moreover, whereas, in the past, nearly all circuit judges had already attained the grade of O-6, many now are, or shortly will be, O-5's competitive for O-6 in a highly selective environment, who understand perfectly that, with respect to their own fitness reports, the least adjustment in the rankings or **slightest nuance in a narrative could make the difference between selection and passover.**

30 M.J. at 1275. As it turns out, that may have been an understatement, for I was once informed by a member of a selection board which considered an officer on whom I had written fitness reports that **those reports, which I had intended to be superlative, were deemed less so because key phrases in the superlative comments I had written were not underlined.** The truth is that the Board for Correction of Military/Naval Records and Article 138 simply are not calibrated to respond to nuances and codes which are instantly recognizable by selection boards, and **anyone seriously concerned with judicial independence needs to understand this.**

Pet. App. 104a (emphasis added). The majority also noted the real danger of "damning with faint praise" when it stated:

> [W]e recognize the severe limitations of these means of redress. **Retribution by fitness report need not be blatant to be effective.** In today's professional atmosphere of intense competition for promotion and retention in the Navy and Marine Corps, **even the most subtle shading of**

> **grades or narrative comment** in a report **can signal the end** of an officer's march up the ladder of success. Yet, these subtleties may not provide a sufficient basis for relief through the methods listed above, but, **if misapplied, constitute as much a threat to judicial independence as the more blatant variety**.

Pet. App. 91a (emphasis added). It is this very subtlety and these fine distinctions which may make all the difference in whether an officer gets selected for promotion, or at the other extreme, "selected" for early retirement.

Because of this broad impact, fitness reports can, and do, have a direct effect on the economic well-being of an officer. Loss of a promotion carries not only the immediate loss of current pay increases, but will carry larger, long-term loss in retirement pay. (The difference in annual income between an O-5 and an O-6 means an annual loss of $6,145.20, the difference in long-term retirement pay amount to $81,338.40 over a 20 year period.)[1] Likewise, selection for early retirement can mean a loss of thousands of dollars over a period of years as well as the immediate one-half reduction in income. (An O-6, who wished to retire at 26 years but was selected to retire at 22 years, loses four years of full salary totalling $312,557.28, as well as $9,955.12 per year in lower retirement pay.) For senior O-5's, Selective Early Retirement Boards may provide a "double whammy" by cutting off both the opportunity for promotion and several more years of service with the accompanying increase in retirement pay. (The loss to an O-5 forced to retire at 20 years rather than promoting to O-6 and retiring at 26 years is $454,277.52 in regular income plus $17,830.08 per year in retirement income.) This certainly creates a direct, personal, substantial, pecuniary interest in

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[1] The calculations are set forth in Appendix G, Pet. App. 141a. They are based upon the 1994 pay scale for officers with dependents. No provision has been made for the effect of the variable housing allowance as that amount is dependant upon the officer's geographic location.

obtaining favorable reports.

This potential to influence an upcoming decision which will lead to an increased monetary benefit places the judges of the Court of Military Review in a position very similar to that of Justice Embry in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), in which this Court found his participation inappropriate where the decision in the case had the **potential** to impact upon settlement negotiations in a separate case, with a different insurance company, in which Justice Embry was a party. The nature of the pecuniary interest is at least as strong and direct in this case, and possibly more so since a "poor" fitness report can lead to, in essence, the loss of a job, not just a law suit.

C. The reasonable observer could find that the Judge Advocate General and the Assistant Judge Advocate General (Military Justice) have interests within the military justice system which are opposed to those of the petitioners and other military servicemembers whose cases are being reviewed.

The Judge Advocate General is the chief legal officer for the Navy. His responsibilities require him to "wear many hats," at least some of which may be at odds with the interests of an accused facing court-martial or on appellate review. In *Tumey*, this Court held that, "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, **necessarily involves a lack of due process** of law in the trial of defendants charged with crimes before him." *Tumey*, 273 U.S. at 445 (emphasis added). Even though that finding related specifically to the person **hearing** the case, the rationale behind it, in terms of appearance, is equally appropriate when viewing the role of the judge's **supervisor**. This is particularly true in the context of this case where the supervisor's opinion can have a substantial impact upon the future of a judge.

In ruling on the question of judicial tenure within the military,

this Court stated in *Weiss v. United States*, that the Judge Advocate General has no interest in the outcome of particular cases. *Weiss*, 114 S. Ct. at 762. While this may well be the case for the routine guilty plea to an unauthorized absence, petitioner respectfully maintains that, periodically, certain cases arise which are of such high visibility or sensitivity that they may well come to his attention. These are the cases which are ripe for well-meaning comments, intended to serve the interests of the Navy, which could inadvertently bring pressure to bear upon a judge concerned for his future.

The events at the 1991 Tailhook Convention led to the "retirement" of the Judge Advocate General and the Deputy Judge Advocate General who was the head of the Naval Investigative Service.[2] In 1988, the Court of Military Review set aside findings of guilty in a case involving gross medical malpractice. *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988). Following this decision an investigation was undertaken by the Inspector General who attempted to look into the deliberation processes of the court. Far from taking the "protective role" attributed to him, the Judge Advocate General ordered the judges of the court to speak with the Inspector General's staff. The members of the court were forced to seek relief from the Court of Military Appeals. *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). Although in that instance, the members of the Court of Military Review were willing to take a stand, and to seek available remedies, at least one member felt that he paid dearly for that action. Pet. App. 49a and 87a.

These two examples are not unique. Recent history shows that high ranking officers continue to be susceptible to political pressure and the urge to "protect" the interests of some at the

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[2] *See* Rowan Scarborough, *Tailhook snags 3 admirals; All leaving posts in naval scandal.*, Washington Times, September 25, 1992.; John Lancaster, *Pentagon Blasts Tailhook Inquiry; Navy leadership faulted in Scandal*, Washington Post, September 25, 1992.

expense of others.[3] Nor is this a new phenomenon. As Judge Wiss noted,

> [T]he. . .decisions of this Court for the past four decades are peppered with instances of honorable persons–line officer, lawyers, judges, and even high-ranking officers of the Judge Advocate General's Corps–who affected the trial or appeal of cases in ways in which they undoubtedly at the time believed were permissible but which this Court ultimately condemned. Parenthetically, while our reasonable person knows that violation of this sworn duty "could. . .expose these military officers to criminal liability under the Uniform Code of Military Justice," 39 M.J. 144-145, our reasonable person also knows that there is no reported prosecution of any of the transgressions just mentioned.

Pet. App. 46a (emphasis in original).

In addition to the above, a more general concern, as it pertains to the issue at hand, would be the Judge Advocate General's strong interest in the smooth operation of the military justice system as a whole, an operation which would be jeopardized by the routine reversal of cases at the appellate level. This consideration was noted by the Court of Military Review when they acknowledged that:

> an important aspect of the JAG's interest in the administration of the military justice system is

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[3] *See Court Says Navy Brass Shielded Official's Son*, Washington Post, June 15, 1994; *Military Court Sharply Rebukes Favoritism in Navy Fraud Case*, N.Y. Times, June 16, 1994. Rear Admiral LeGrand, newly appointed Deputy Judge Advocate General, and another senior Judge Advocate were among those involved in obtaining lenient treatment for the son of former Navy Secretary, H. Lawrence Garrett, III. The position of Deputy Judge Advocate has traditionally been a stepping stone to appointment as the Judge Advocate General.

> that it operate efficiently, i.e., that it support rather than detract from the operational efficiency of the service. Decisions of this Court which set aside any portion of the proceedings below may impede that efficiency.

Pet. App. 85a-86a. Therefore, on a larger scale, the interests of the Judge Advocate General are best served by cases being affirmed on appeal–an interest directly opposed to that of petitioner and all other accused who come within the military justice system. It is these concerns (high visibility cases, systemic efficiency) which the Court of Military Appeals failed to adequately address, and which form a strong basis upon which a reasonable observer might reach a finding of potential bias on the part of the Judge Advocate General.

The Assistant Judge Advocate General for Military Justice is more directly involved in the military justice process. His duties include supervising the criminal law division, reviewing all military appellate court decisions for systemic malfunction, and being responsible for the administrative processing of courts-martial. Pet. App. 69a. The Court of Military Review specifically found that at times its decisions may disapprove service-wide policy previously approved by the Assistant Judge Advocate General in his supervisory role over the criminal law division. Pet. App. 95a. The court went on to state that:

> [A]lthough we find nothing *actually* inimical to our independence in this arrangement, arguably a reasonable observer may conclude that it is inappropriate for an officer whose duties do not include supervising the Court's judges, but whose professional responsibilities are so *directly* and *closely* affected by the Court's decisions, to participate in the evaluation of the appellate judges."

Pet. App. 95a (emphasis in original). Thus the Court of Military Review recognized that, even if the Judge Advocate General

does not, the Assistant Judge Advocate General frequently has a direct interest in specific cases. This finding by the Court of Military Review was essentially ignored by the Court of Military Appeals which simply concluded that the AJAG "is neither a prosecutor nor aligned with the Government as a result of his duties." Pet. App. 19a. Given the Assistant Judge Advocate General's involvement in the drafting of the fitness reports of the judges, particularly when he was also ranked against them, his interest creates a clear conflict for the members of the court which violates Due Process requirements as established by this Court in *Tumey* and *Ward*.[4]

III. The Court of Military Appeals inappropriately restricted the issue presented thereby unconstitutionally increasing the burden on petitioner.

An analysis of Due Process requires a balancing of interests between those of the individual and, in the case of the military, the deference to be accorded Congress. The question presented to the Court of Military Appeals was whether the preparation and signing of Navy-Marine Corps Court of Military Review judges' fitness reports **by the Judge Advocate General** created an actual or apparent lack of independence on the part of those judges. In ruling that the civilian Constitutional standard was not applicable to petitioner's case, the court stated that, "we need only decide whether the appearance factors favoring appellate military judges **without these Naval officer-fitness reports** 'are so extraordinarily weighty as to overcome the balance struck by Congress' and the Department of the Navy." Pet. App. 14a (emphasis added). In so doing, the court **assumed** that petitioner's interest would be satisfied only by totally doing away with fitness reports on the judges of the Court of Military Review. The proper question in this context

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[4] Petitioner notes that following the decision of the Court of Military Review in this case, the AJAG ceased to be ranked against the Marine Corps members of the court, nor did he continue to provide recommendations regarding the **ranking** of those members.

is whether the appearance factors favoring **the Judge Advocate General and Assistant Judge Advocate General's preparation** of appellate military judges' fitness reports are so extraordinarily weighty as to overcome the balance struck by Congress. This allows for the possiblity of several solutions, not all of which interfere with requirements established by Congress or the Service Secretay.

Using the question as framed by the court, the burden on petitioner is greatly increased as he must prove that the problems are so severe as to require the wholesale abandonment of the Navy Officer fitness reporting system, at least as it pertains to appellate court judges. The Court of Military Appeals required this to be balanced against Congressional and service interests in having some means of evaluation and accountability for these military officers who happen to be serving as judges for a short period. Because fitness reports are required by Navy Regulation, this limitation of the issue requires petitioner to overcome the strong judicial deference accorded statutes and regulations pertaining to the Armed Forces. On the other hand, the only basis the court could find for the JAG and AJAG's involvement in the preparation of the judge's fitness reports was to draw a conclusion based upon the administrative relationship set forth in the Organization Manual of the Office of the Judge Advocate General which "describes the Court as a 'field activity' of the JAG and states that the Chief Judge 'reports' to the JAG." Pet. App. 75a, n5.

Weighing the balance as argued by petitioner allows the court to consider possible alternatives that would be less intrusive upon the role Congress plays while preserving the due process rights of servicemembers. When analyzed in this way, utilizing the appropriate standard, and allowing for alternative remedies such as requiring clear criteria, or changing the reporting senior to someone wholly outside the military justice system, petitioner's argument is even more compelling.

CONCLUSION

"The parade of horribles now is documented, and the cries for reform appear to be compelling." Pet. App 49a. There is no doubt of the potential for fitness reports to "subvert military justice." This was recognized by the Court of Military Appeals in *Mabe* and *Graf*, and by Congress when they enacted Article 37 of the Uniform Code of Military Justice. Significantly, the Court of Military Review stated that the current system does not "'transgress' the appellant's right to have his appeal heard by an independent judicial body *if* there are adequate assurances within the military justice system that those reports will not be based upon nor influenced by judicial opinions and rulings." Pet. App. 85a (emphasis in original). These assurances simply do not exist in the present system. As Judge Wiss noted:

> [T]he picture is far from focused as to what are the criteria on which appellate judges are rated–officers whose full-time job is to make findings and sentencing decisions. More than one judge below expressed pointed concern in this regard. *See infra*. I cannot help but wonder whether our reasonable person would be so fully assuaged as the majority when faced with the fact that, while judges cannot lawfully be rated on their findings and sentencing decisions, year in and year out they are rated against some criteria and on *some* basis–the nature of which even the appellate judges below in the case expressed uncertainty and reservations.

Pet. App. 47a (emphasis in original). In the absence of clear objective ranking critera, and evidence that effective means of redress exist whereby seniro officers who break the rules will be disciplined, the present system does not provide the neeed

assurances to satisfy due process. Accordingly, the Court should issue a writ of certiorari to address this important issue of law.

Respectfully submitted,

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July 28, 1994

APPENDICIES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-1044

NMCM 92 1933

UNITED STATES, *Appellee,*

v.

Andrew Mitchell, Jr., *Appellant.*

Argued Oct. 5, 1993

Decided Apr. 29, 1994

For appellant: *Lieutenant Alice B. Lustre*, JAGC, USN (argued)

For appellee: *Colonel T. G. Hess*, USMC (argued); *Commander S. A. Stallings*, JAGC, USN and *Captain Laulie S. Powell*, USMC (on brief).

Amici Curiae on behalf of appellant: *Richard T. McNeil* (argued); *Joseph B. Gilbert* (on brief) - For Members Opposed to Maltreatment of Servicemembers. *Colonel Stephen D. Smith, Major Robin L. Hall, Captain Thomas D. Wright* (on brief) - For Defense Appellate Division, USA.

Amici Curiae on behalf of appellee: *Colonel Jeffery T. Infelise* and *Captain Jane M.E. Peterson* (on brief).

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a special court-martial composed of a military judge sitting at Naval Air Station, Pensacola, Florida, on June 17, 1992. In accordance with his pleas, he was found guilty of wrongful disposal of military property, theft of property of the United States, indecent assault, and using indecent language, in violation of Articles 108, 121, and 134, Uniform Code of Military Justice, 10 USC §§ 908, 921, and 934, respectively. He was sentenced to a bad-conduct discharge, forfeiture of $500 pay per month for 4 months, and reduction to pay grade E-1. The convening authority approved this sentence on August 4, 1992. The Court of Military Review affirmed the findings of guilty and the sentence in this case on May 24, 1993. 37 MJ 903 (*en banc*).

On July 13, 1993, this Court granted review on the following issue of law:

> WHETHER THE JUDGE ADVOCATE GENERAL OF THE NAVY'S PREPARATION AND/OR SIGNING OF THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW JUDGES' FITNESS REPORTS DEPRIVE THAT COURT OF ITS INDEPENDENCE AND THE APEARANCE OF INDEPENDENCE.

A. WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN FINDING THAT NO APPEARANCE OF INTERFERENCE IN THE INDEPENDENCE OF THAT COURT'S JUDGES EXISTS.

B. WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW APPLIED AN INCORRECT TEST BY REQUIRING A SHOWING OF THE EXISTENCE OF *ACTUAL* PREJUDICE.

In accord with our recent unanimous opinion in *United States v. Graf*, 35 MJ 450, 464-67 (CMA 1992), *cert. denied*, 114 S.Ct. 917 (Jan. 24, 1994), we hold that the naval officer fitness-report system, in effect at the time of appellant's review before the Navy-Marine Corps Court of Military Review, did not deprive that court of its independence or its appearance of independence. *See generally Weiss v. United States*, ___ U.S. ___, 114 S.Ct. 752 (Jan. 19, 1994).

FACTS

Appellant received a bad-conduct discharge as part of his adjudged sentence. After approval of this sentence by the convening authority, his court-martial case was sent to the Court of Military Review in accordance with Article 66(b)(1), UCMJ, 10 USC § 866(b)(1), on August 17, 1992. Appellate counsel was assigned and a brief filed there on December 16, 1992. In that brief she assigned the following error:

> THE JUDGE ADVOCTE GENERAL OF THE NAVY'S PREPARATION OF THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW JUDGES' FITNESS REPORTS DEPRIVES THE COURT OF ITS INDEPENDENCE AND THE APPEARANCE OF INDEPENDENCE.

The parties to this appeal then moved the Court of Military Review to admit various appellate exhibits concerning the assigned issue. At no time did appellant move to disqualify any particular member of the Court of Military Review.

The Court of Military Review then issued its opinion in this case. In providing a "factual" background for resolving the assigned issue, it began with the following footnote:

> The details in this background are included to provide an adequate factual record on which to decide this issue. The factual matter described above was developed at the appellate stage, pursuant to our fact-finding powers under Article 66(c), UCMJ, through a combination of discovery and disclosure as well as judicial notice of commonly known regulations and practices in the Department of the Navy. Unless otherwise indicated, the details of fitness report preparation and the identity of the participants in the process pertain to the more recent annual fitness report cycle for Navy captains and Marine Corps colonels, which ended 31 July

1992.

The text of the opinion begins:

> Fitness reports are required for all commissioned officers in the Department of the Navy. This requirement is imposed by Article 1129 of Navy Regulation, which are issued pursuant to 10 USC § 6011 and have the force of law. *See Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886l1961). Fitness reports are submitted annually and on certain other specified occasions, such as transfer. In the Navy, the fitness report requirement is implemented by Naval Military Personnel CommandInstruction(NAVMILPERSCOMINST) 1611.1A of 26 March 1990, Subj: Reports on the Fitness of Officers, and in the Marine Corps Order (MCO) P1610.7 of 6 November 1985, Subj: Performance Evaluation System. The latter specifically directs that reports for Marine judges comply with instructions of the JAG in addition to the policies in the Marine Corps order itself. *Both directives stress the importance of the fitness report for promotion, retention, and assignment of the officer concerned. In addition, both entitle the officer concerned to review his report and, if he is dissatisfied with its contents, to submit a statement to that effect.*
>
> The fitness reports for Navy and Marine Corps officers serve not only to

assess an officer's performance and conduct during the past reporting period, but also to identify his value to the Department of the Navy for the future. Although the primary function of these reports is to identify those officers best qualified to meet the leadership and technical needs of the Nation's sea services, another significant purpose is to inform the officer concerned of his deficiencies and areas where he can improve. Both directives require that the office be counseled if his report is adverse in any category of evaluation. Both Navy and Marine Corps reports require evaluation in several key areas of performance, including some arguably relevant to this issue, such as loyalty (USMC), cooperation (USMC), organizational support (USN), working relations (USN), and judgment (both).

In addition, both fitness report directives identify the officer responsible for the submission of the report–the "reporting senior"–as the next officer senior to the evaluated officer in the chain of command who is specifically authorized by the controlling directives to submit the report. For this Court's judges, that officer has been the JAG. Judge Advocate General Instruction 5400.1A of 6 July 1992, Subj: Office of the Judge Advocate General (OJAG) Organization Manual, § 109. For Marine judges, there is an additional participant in the fitness report process, called

the "reviewing officer," who is required to review the reporting senior's submission for consistency, accuracy, lack of bias, and adherence to Marine Corps fitness report policy. MCO P1617.7. For the three Marine judges on this Court, that officer has, in recent times, been the Assistant Commandant of the Marine Corps.

Another requirement of both fitness report directives is comparison rankings with similarly evaluated officers of the same pay grade in the same organization. All presently assigned appellate judges are in pay grade O-6. Consequently, the five existing Navy appellate judges (excluding the Chief Judge) are ranked against each other. Because of his additional administrative duties, the Chief Judge is ranked against no other officer. Marine appellate judges are ranked against other Marine Corps colonels for whom the JAG is the reporting senior. For each of the three Marine judges currently assigned, this group includes the other two Marine judges and the Assistant Judge Advocate General for Military Justice ("AJAG").

Recommended fitness reports for appellate judges are routinely prepared by the AJAG, or by his principal assistant, for submission to the JAG for review and signature. The JAG has the sole discretion to accept, modify, or reject the recommendations. Each judge has been afford-

ed the opportunity to provide information and comments for incoporation into his report before its preparation.

Because the AJAG fills a significant role in the preparation of the judges' fitness reports, an explanation of his duties is in order. He is generally responsible to the JAG for performance of the JAG's military justice duties under the UCMJ, the Manual for Courts-Martial (MCM), and Judge Advocate General Instruction 5800.7C of 3 October 1990 (JAGMAN). OJAG Organization Manual, § 107. In this capacity he supervises the Director, Criminal Law Division, and is responsible for that officer's performance of his duties. *Id.* The duties of the Director, Criminal Law Division, include drafting legal and policy advice for the JAG on military justice matters; reviewing legislative and regulatory proposals affecting military justice; reviewing all decisions of military appellate courts for systemic malfunction; staffing JAG certification of issues for appellate review; and providing timely gudance to all military justice practitioners in the Department of the Navy. *Id.* The AJAG also serves as the Officer-in-Charge, Navy-Marine Corps Appellate Review Activity (NAMARA). In that capacity, he is responsible to the JAG for the administrativeprocessing of courts-martial under Articles 66, 67, 69 and 73, UCMJ. This general responsibility includes, *inter alia*,

> receiving cases from the field and preparing them for review by this Court and by the Court of Military Appeals; issuing mandates and orders directed by the appellate courts; and supervising appellate counsel for the appellants and the Government.

37 MJ at 905-06 (emphasis added).

INTRODUCTION

This is the third of three recent cases in which a major facet of military justice system has been challenged. *United States v. Weiss*, 36 MJ 224 (CMA 1992), *aff'd*, 114 S.Ct. 752 (1994) (appointment of military judges and terms of office for military judges); *see United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, 114 S.Ct. 917 (Jan. 24, 1994). Today, this Court holds that Naval regulations requiring officer-fitness reports for appellate military judges do not abrogate the Fifth Amendment; Article 37, UCMJ, 10 USC § 837; or RCM 902, Manual for Courts-Martial, United States, 1984. *See generally United States v. Mabe*, 33 MJ 200 (CMA 1991).

All these cases are significant because they show that the process which Congress has devised to permit challenges to our system works. Courageous and competent military defense counsel are bringing these challenges at the trial level. The same courage and expertise has also been shown at the appellate level. In addition, this Court has not summarily denied review in these cases, using our discretionary review power. Art. 67(a)(3), UCMJ 10 USC § 867(a)(3)(1989). Finally, the

Supreme Court has recognized the importance of the Constitutional rights of servicemembers by granting certiorari in two of these cases. As Justice Ginsburg observed in her separate opinion in *Weiss*: "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." 114 S.Ct. at 769.

I

DEFENSE CLAIM

Appellant's case was reviewed by the Navy-Marine Corps Court of Military Review in accordance with Article 66 of the Code. He asserts that the *Due Process Clause of the Fifth Amendment* requires that such a judicial review be done by a court independent in appearance, as well as in fact.[5] Relying on *Marshall v. Jerrico*, 446 U.S. 238 (1980), he then argues that the Naval officer fitness-report system created a constitutionally impermissible appearance of "impropriety" concerning his appellate military judges. Accordingly he asks that the decision of the Navy-Marine Corps Court of Military Review in his case be set aside and his case be remanded to a Court of Military Review whose military judges are not subject to this fitness-report system.

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[5]The Code of Judicial Conduct of the American Bar Association (1989) provides in Canon 1 that a "JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society...."

Nevertheless, what is an independent judiciary is the question in dispute even in the civilian community. *See* Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979); *cf.* Berger, *"Chilling Judicial Independence": A Scarecrow*, 64 Cornell L.Reversed 822 (1979).

We initially note that the briefs were filed and oral argument heard in this case prior to the decision of the Supreme Court in *Weiss v. United States*, ___ U.S. ___, 114 S.Ct. 752 (Jan. 19, 1994). That decision held that the Due Process Clause of the Fifth Amendment was not violated because trial and appellate military judges had no fixed terms of office. *The Supreme Court specifically noted that those petitioners did "not allege that the judges in their cases were or appeared to be biased." Id.* at 761. Appellant in the assigned issue avers both that his appellate military judges were not independent and that they did not appear to be independent in the review of his case. However, he makes no argument and acknowledges that there is no evidence that his appellate military judges were not actually independent in his case. Accordingly, our Constitutional inquiry is appropriately limited to *the appearance of independence of the military judges* who sat on the appellate review of this case.

We also note that appellant's "appearance-of-impropriety" claim is predicated on two related suppositions concerning the Naval officer fitness-report system. First, he asks this Court to hold as a matter of law that *a reasonable person might perceive* that the Judge Advocate General of the Navy, the signer of the appellate military judges' fitness reports, and the Assistant Judge Advocate General, the drafter of these reports, were biased for the prosecution or aligned with the Government at the time his appeal was decided. Second, he asks this Court to hold as a matter of law that *a reasonable person might perceive that* appellate military judges generally shape their findings and sentencing decisions in hopes of acquiring favorable fitness reports. Both possible perceptions, he asserts,

combine to create a constitutionally impermissible appearance that his appellate military judges shaped their decisions in his case in the Government's favor. Final Brief at 45.

II

REASONS FOR DENYING CONSTITUTIONAL CLAIM

A

INCORRECT CONSTITUTIONAL STANDARD

Appellant's claim in the present case is based on the Due Process Clause of the Fifth Amendment and the decision of the Supreme Court in *Marshall v. Jerrico, supra*. He asserts that the Naval officer fitness-report procedure violates the above constitutional provision because it creates "a possible temptation to the average man as judge" to engage in an unfair or biased appellate review in favor of the Government. Final Brief at 45, quoting *Marshall* (446 U.S. at 242). His argument, however, ignores the fact that his Constitutional due process claim is raised in the context of a court-martial. *See Weiss v. United States*, 114 S.Ct. at 760-61.

The Supreme Court has long held that the Due Process Clause basically requires a "fair trial in a fair tribunal." *In Re Murchinson*, 349 U.S. 133, 136 (1955). Moreover, the Supreme Court has also held that this Constitutional provision requires a tribunal where the "probability" of actual "unfairness" is not great. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Thus, the appropriate question in a civilian context is

whether a litigant faced a "constitutionally intolerable" risk of unfairness when his case is decided by a particular judge or judicial tribunal. *Id., see Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___ 113 S.Ct. 2264, 2277 (1993).

Of course, it is equally well established that a servicemember's Constitutioinal rights are not identical to his civilian counterpart. The Supreme Court in *Parker v. Levy*, 417 U.S. 733, 758 (1974), commented on this Constitutional reality as follows:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it....

Moreover, recently in *Weiss v. United States, supra*, the Supreme Court reiterated its long-standing position that great deference be afforded to congressional determinations "relating to the rights of servicemembers." *Id.* at 761. A similar policy of deference has been applied by the Supreme Court with respect to service regulations when they are promulgated by the military in accordance with congressional direction. *See Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986).

In appellant's case, it is uncontroverted that the complained-of fitness-report evaluations were authorized by Department of the Navy regulations. Moreover, these service regulations were not now, and Congress was clearly aware of them when it amended Article 66(a), UCMJ, 10 USC § 866(a), in 1968, and created a court including appellate military judges. *See* Art. 66(g) (1968). Therefore, although a servicemember has a Constitutional right to a judicial tribunal which appears independent, *de novo* application of the civilian Constitutional standard to determine the scope of this right is not appropriate. Instead, we need only decide whether the appearance factors favoring appellate military judges without these Naval Officer-fitness reports "are so extraordinarily weighty as to overcome the balance struck by Congress" and the Department of the Navy. *Weiss v. United States*, 114 S.Ct. at 761; *Middendorf v. Henry*, 425 U.S. 25, 44 (1976). *See generally Goldman v. Weinberger*, *supra* at 507-08. Appellant's Constitutional argument initially fails because he has not met his heavy burden to show the Constitutional invalidity of this facet of the military justice system. *Id.*

B

FIRST INVALID PREMISE

(No Reasonably Possible Perception of JAG or AJAG Prosecutorial Bias)

An additional reason that appellant's Constitutional claim fails is that he has not established the legal premises supporting it. A lynchpin of appellant's due process claim against the fitness-report system is his argument that the makers of these reports for appellate military judges must be viewed as a matter of law as aparently biased in favor of the prosecution. He argues that such a legal conclusion is required because a reasonable person viewing the JAG and AJAG's duties and their performance of these duties might perceive them to be aligned with the Government. We disagree. *See generally Weiss v. United States*, 114 S.Ct. at 762.

(1)

STATUTORY DUTIES OF JAG

REGULATORY DUTIES OF AJAG

Appellant initially asserts that the Judge Advocate General of the Navy "serves various, often contradictory, roles within the military justice commands of the Navy-Marine Corps Appellate Review Activity and the Court of Military Review." Final Brief at 21. He further asserts that "the JAG's best interests are not always aligned with the protection of the court." Final Brief at 26. Finally, he asserts that "the JAG's and AJAG's prosecutorial duties within the command structure

create an unresolved conflict between the JAG's interest in furthering prosecutorial objectives and simultaneously preserving the court's independence." Final Brief at 44. In general, he cites the JAG's statutory role as the provider of legal services to Navy Commands and his statutory roles in the military justice system.[6]

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[6]A separate opinion joined by several judges in the court below noted the following statutory responsibilities of the Judge Advocate General of the Navy in general:

> The Office of the Judge Advocate General of the Navy is in the executive part of the Department of the Navy. 10 USC § 5148(b). The Judge Advocate General of the Navy performs his duties under the direction of the Secretary of the Navy. 10 USC § 5148(d).
>
> The Jude Advocate General of the Navy is assigned to the staff of the Chief of Naval Operations (CNO) as Special Assistant for Legal Services, and is tasked to advise and assist the CNO in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy. JAGINST 5400.1A, § 102.b. Additionally, the JAG exercises, for CNO, centralized coordination of the provision of legal services by the Naval Legal Service Command and other judge advocates; effects liaison with the Commandant of the Marine Corps concerning legal service matters of mutual interest to the Navy and Marine Corps; and maintains liaison, for the CNO, with other DOD components, other government agencies, and agencies outside the Government on legal service matters affecting the Navy. JAGINST 5400.1A, § 102.b.

37 MJ at 922-23 (Reed, J., concurring in the result).

Chief Judge Larsen also summarized the Judge Advocate General's particular responsibilities under the Uniform Code of Military Justice:

> The UCMJ authorizes the JAG to perform a variety of functions, which in sum total describe his role in the military justice system as a crucial one. Specifically, under Article 6, assignments of all judge advocates in the Navy, including trial and appellate judges, are made upon his recommendation. Article 6(b) also establishes the right of

Again, we must note that appellant's appeal was still pending when the Supreme Court handed down its decision in *Weiss v. United States, supra*. There the Supreme Court commented on the relationship of the Judge Advocate General with military judges as follows:

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any staff judge advocate in the field to communicate directly with the JAG. Under Articles 26 and 27, military judges and trial and defense counsel must be certified by him before they can practice in courts-martial, authority that necessarily implies the concomitant authority to decertify. Noted earlier was his mandate to establish this Court and appoint its judges under Article 66. Article 67 grants him the authority to refer issues of law to the Court of Military Appeals, as does Article 69 with respect to the Court of Military Review. Article 69 also assigns the JAG the responsibility to determine legal and factual errors in all courts-martial which are not subject to review under Article 66. Finally, the JAG is authorized to grant a new trial under Article 73. Furthermore, under departmental regulations, the JAG acts for the Secretary of the Navy in the exercise of many of the latter's powers under the UCMJ. For example, in the name of the Secretary, he grants convening authority status to various commanders pursuant to Article 22(a)(6). JAGMAN § 0115.

37 MJ at 909.

> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 USC § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. *By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-marial, we believe Congress has achieved an acceptable balance between independence and accountability.*

114 S.Ct. at 762 (emphasis added).

This view of the protective role of the Judge Advocte General with respect to judges in the military judge system is not new. In *United States v. Mabe*, 33 MJ at 205-06, this Court noted the Judge Advocate General of the Navy's express recognition of this important responsibility and his actions in that case exercising that responsibility. Accordingly, we cannot presume for the purpose of appellant's argument that the Judge Advocate General holds a prosecutorial office or that the duties of his position reasonably imply a bias in favor of the Government. *Weiss v. United States, supra*.

Turning to the Assistant Judge Advocate General for Military Law, we note that his duties are not statuto-

ry, but are regulatory. *See supra* at (*8*). We have evaluated those duties and conclude that he, like the Judge Advocate General of the Navy, is also neither a prosecutor nor aligned with the Government as a result of his duties.

Accordingly, we conclude that appellant's systemic due process claim also fails to the extent it rests on a misapprehension of the lawful role of these military officers in the military justice system. 114 S.Ct. at 762 (Judge Advocates General "have no interest in the outcome of a particular court-martial."). *Cf. In Re Murchinson*, 349 U.S. 133 (1955) (judge as one-man grand jury); *Kendrick v. Carlson*, 995 F.2d 1444 (8th Cir. 1993) (United States Attorney is counsel for Government in all cases brought in district while in office).

(2)

PERFORMANCE OF JAG AND AJAG DUTIES

Appellant's assertion of a reasonably possible perception of prosecutorial bias on the part of the Judge Advocate General of the Navy and the Assistant Judge Advocate General for Military Law is not based exclusively on the former's statutory duties or the latter's regulatory duties. In his brief, appellate defense counsel cited examples of both officers' exercise of their military responsibilities over the years which might reasonably imply prosecutorial bias. It states:

> *Third*, Judge Rubens' well known perception [7] that his fitness reports and promotion opportunities were adversely affected by his participation in high profile decisions of the court creates an appearance of impropriety. *Fourth*, the JAG's skewed pattern of certifying issues to this Court to further prosecutorial interests rather than impartially guarantee this Court's review of vital legal issues as required by his judicial certification powers creates an appearance of impropriety. And, *finally*, the AJAG's collusion with the Government in obstructive tactics and claims of attorney-client relationship create the appearance of prosecutorial bias....

Final Brief at 44 (emphasis added).

We first note that the record before us does establish that *Judge Reubens perceived* his professional military career was adversely affected by an Assistant Judge Advocate General as a result of his decisions as an appellate military judge. Judge Reubens, however, did not sit on appellant's case nor was his putative nemesis, Colonel Mitchell, the Assistant Judge Advocate General of the Navy at the time of the appellate review of appellant's case. Moreover, the judge's claims are now disputed by the Assistant Judge Advocate General. In any event, no evidence was presented that this matter was ever submitted to the Judge Advocate General of the Navy for action prior to the challenged review of

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[7] See 37 MJ at 913-14 for a discussion of former Judge Ruben's affidavit.

appellant's case. *Cf. United States v. Mabe*, 33 MJ at 206.

We next note that concern about the certification practice of the Judge Advocate General of the Navy was called to our attention most recently in *United States v. Schoof*, 37 MJ 96 (CMA 1993). In that case, we held that appellant who actually received appellate review before our Court had no standing to complain about this practice for purposes of an equal protection of law argument. *Id.* at 100. We had no occasion to decide in that case whether this practice, in its present statutory framework generally favoring defense appeals, established as a matter of law a prosecutorial bias on the part of the Judge Advocate General of the Navy.

In *United States v. Monett*, 16 USCMA 179, 180 n.1, 36 CMR 335, 336 n.1 (1966), this Court commented on the role of the Judge Advocate General in the certification process, as follows:

> The Uniform Code of Military Justice confers upon The Judge Advocate General independent judicial or quasi-judicial responsibilities which are so substantially separated from the mainstream of prosecution that it is at least arguable that his office stands entirely apart from either party to the case. *See* Articles 61, 66(f), and 69, Code, *supra*, 10 USC §§ 861, 866, and 869, respectively. The Uniform Code provides that the United States shall be represented by trial counsel at the trial level and by appellate Government counsel at the appellate level. Articles 38 and

> 70(b), Code, *supra*, §§ 838 and 870, respectively. Considering these factors, The Judge Advocate General's authority to certify issues of law for review by this Court is not unlike the authority of the Courts of Appeals to certify issues to the United States Supreme Court. It is also apparent from our records that, in certifying issues, The Judge Advocate General has acted not only in cases in which the decision of the board of review has been favorable to the accused, but also when the decision has been adverse to him.

We finally note that appellant in his brief asserts that appellate government counsel asserted an attorney-client relationship with the JAG in this case. He states:

> During proceedins before the Court of Military Review, the Appellate Government Division asserted a claim of attorney work-product with regard to a memorandum forwarding its request for certification to the JAG. Government Response to Appellant's Motion to take Depositions. This claim was asserted again at oral argument, and although the documents were ultimately produced, it was done through a "waiver" of the asserted privilege. Government Motion to Respond to Questions Raised by Court at Oral Argument. While "work-product" includes notes and memorandum created by an attorney or his agent in anticipation of litigation, that privilege applies only to materials that are

> used by and for the attorney or his agent. *United States v. Vanderwier*, 25 MJ 263 (CMA 1987).

Final Brief at 41.

We are not persuaded that the record before us establishes a reasonably possible perception that the Judge Advocate General of the Navy or his Assistant for Military Law is biased in favor of the prosecution. *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). One unrelated personnel controversy, one raw statistical study, and one questionable tactical decision by counsel during this very case do not provide a reasonable basis for calling into question the impartiality of the above-named military officers. *See generally United States v. Cooley*, 1 F.3d 985, 993-94 (10th Cir. 1993). *See also McCleskey v. Kemp*, 481 U.S. 279, 292-97, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987). In any event, as noted above, even if such a reasonably possible perception may lie on this basis, appellant's particular Constitutional claim as averred, requires more.

C

SECOND INVALID PREMISE

(No Reasonably Possible Perception That Appellate Judges Shape Their Opinions Because of Fitness Reports)

Appellant's second supposition supporting his due process claim is that a reasonable person or observer might perceive that appellate military judges general-

ly shape their judgments to secure better fitness reports from the JAG or AJAG.[8] Such an argument implies that the appellate decisions of these military judges can be reasonably viewed as an appropriate subject for a Naval officer fitness report. We reject both contentions as a matter of law. *United States v. Graf* and *United States v. Mabe, both supra* at (9).

The above argument is simply not justified in view of the realities of our present military justice system. Three reasons support our conclusion. *First,* the challenged decision of the Court of Military Review in this case was handed down in May of 1993. Its judicial action occurred long after our decisions in *United States v. Mabe,* 33 MJ 200 (1991), and *United States v. Graf,* 35 MJ 450 (1992), *cert. denied,* 127 L. Ed. 2d 206, 114 S.Ct. 917 (Jan. 24, 1994), which expressly prohibit the Judge Advocate General or his designee's use of fitness reports to control the findings-and-sentencing decisions of military judges. *Second,* not a shred of evidence has been presented to this Court that the Judge Advocate General or his Assistant for Military Law have disregard-

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[8]Judge Reed, in his opinion below concurring in the result, summarized these interests as follows:

> Some may argue that the only impact that a fitness report has on a judge is whether a judge makes flag or general officer rank. More is at stake than that. Junior judges hope for a coveted followon tour; 0-5's hope to make 0-6 (although there are no 0-5's on this Court today there have been in the past and the Army routinely assigns 0-5's to its Court); 0-6's hope to avoid involuntary selective early retirement if they are not ready to retire; Marine 0-6's may seek the AJAG (Military Justice) billet which in the recent past has allowed an 0-6 to retire as an 0-7; etc.

37 MJ at 930 n.21.

ed these decisions with respect to the fitness reports on the appellate military judges involved in this case. *See also United States Navy-Marine Corps Court of Military Review (hereafter NMCMR) v. Carlucci*, 26 MJ 328, 336 (CMA 1988)(military judges subject to ABA Code of Judicial Conduct). *Third*, review of the opinions of the Court of Military Review judges in this case reveal that none of those judges actually believed that their fitness reports could be used to evaluate their findings-and-sentencing decisions. *Cf. United States v. Deain*, 5 USCMA 44, 53, 17 CMR 44, 53 (1954). Thus, accepting, arguendo, existence of the possibility of a reasonable perception of prosecutorial bias on the part of JAG or AJAG, we unequivocally conclude that it is not reasonable to further perceive that fitness reports of appellate military judges can be used to evaluate their judicial decisions.

D

INADEQUATE CIVILIAN CONSTITUTIONAL CLAIM

Appellant broadly asserts that the Naval officer fitness-report system creates a constitutionally unacceptable appearance of impropriety with respect to the appellate review of his case by military judges. Even if we applied the civilian Constitutional standard for determining an unfair tribunal to this claim, we would find it to be without merit. He has simply not persuaded us that *his reasonable man perceptions* concerning the Naval officer fitness-report system created a constitutionally impermissible risk that his case was decided unfairly by his appellate military judges. *See generally Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813,

820-25, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986) (defining constitutionally impermissible risk of unfairness to parties). *Cf. Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. at 858-62 (defining statutorily impermissible risk of injustice to the parties).

The Supreme Court has provided general guidance in determining when the appearance of unfairness in a civilian tribunal is too great to be "constitutionally tolerable." Justice White, speaking for the Court in *Withrow v. Larkin*, 421 U.S. at 47, stated:

> In pursuit of this end, *various situations* have been identified in *which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.* Among these cases are *those in which the adjudicator has a pecuniary interest in the outcome* and in which he has been the target of personal abuse or criticism from the party before him.

(Emphasis added; footnote omitted.)

Recently, the Supreme Court more particularly delineated the required approach as follows:

> Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case. In *Tumey* [*v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927)], while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that

"it certainly violates the Fourteenth Amendment ... to subject [a person's] liberty or property to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case." 273 U.S. at 523, 47 S.Ct., at 441.

More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the

> "*situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'*" *Ward* v. *Village of Monroeville*, [409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80] at 60, 93 S.Ct., at 83.

Aetna Life Insurance Co. v. Lavoie, 475 U.S. at 821-22 (emphasis added).

Appellant's Constitutional argument does not satisfy this approach for two reasons. First, he has framed his appearance-of-impropriety argument concerning the fitness-report system largely in terms of the views of a reasonable person ("average man as judge,"-Final Brief at 45). Yet, the Supreme Court has made it clear that a Constitutional appearance-of-fairness question is to be decided from the perspective of "a reasonable judge." *Id. See also United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990). Second, he has based his appearance-of-impropriety argument on a showing of a reasonable possibility of a perceived pecuniary interest of his judges in deciding his case unfairly. The Supreme Court, however, has made it clear that a showing of a "direct" pecuniary interest in deciding the case unfairly is required to establish a Due Process Clause appearance-of-unfairness violation. *E.g., Ward v. Village of Monroeville*, 409 U.S. at 60; *Tumey v. Ohio*, 273 U.S. at 523. The contingent convoluted argument posited by appellant is simply too speculative and remote to violate the Constitutional norm. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 826, citing *Marshall v. Jerrico*, Inc., 446 U.S. at 243.

III

IMPLIED DEFENSE CLAIM

Appellant's reasonable-person arguments, however, do suggest an additional question for review, namely: Whether the judges of the Navy-Marine Corps Court of Military Review should have recused them-

selves *sua sponte* from sitting in this case under RCM 902(a). That presidential regulation provides: "*In general.* Except as provided in subsection (e) of this rule [entitled *waiver*], a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality *might reasonably be questioned.*" (Emphasis added.) We further note that subparagraph (c)(1) of this same rule broadly defines "Proceeding" to "include[ ] pretrial, trial, post-trial, *appellate review*, or other stages of litigation." (Emphasis added.) Accordingly, if appellant's military judges actually believed that a reasonable person might perceive them as not being independent, they were required as a matter of regulatory law to disqualify themselves from participating in the review of this case. *Id. Cf.* 28 USC § 455. *Liljeberg v. Health Service Acquisition Corp., supra; See generally* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L.Rev. 736, 745-50 (1973).

In this regard, we note the following comments from the majority opinion in *United States v. Mitchell*, 37 MJ at 916-17, by the court below:

> Our inquiry into the appearance aspect of this assigned error does not stop with an assessment of the JAG's role in the fitness report process. Arguably, the method by which the JAG uses his staff to prepare fitness reports for his signature is solely within his discretion. Yet, if evidence suggests that fitness reports are actually prepared for the JAG's signature by an officer whose interests may be contrary to decisions that favor the appellant,

we must look behind the veil to see if that process offends the appellant's right to an independent court. *See United States v. Hilow*, 32 MJ 439 (CMA 1991)(court must examine process by which convening authority detailed members to court-martial to ensure compliance with Article 25, UCMJ.)

[F]itness reports for appellate judges are prepared in the office of the AJAG. Within the Office of the JAG, this officer "stands in the shoes" of the JAG for military justice matters and, therefore, is duty-bound to ensure that military justice is administered fairly and independently. Presumably, he shares the same interest as the JAG in preserving the Court's independence.

At the same time, the AJAG is responsible, through the Director, Criminal Law Division, for implementing this Court's decisions in the field. Some of those decisions may disapprove service-wide policy previously approved by the AJAG and some could lead to significant change in the way that the military justice system operates in the Navy and Marine Corps. *See, e.g., United States v. Holloway*, 36 MJ 1078 (NMCMR 1993)(holding that the Navy's military magistrate program does not comply with *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L. Ed. 2d 49 [1991]). In addition, we attach meaning to the fact that, organiza-

> tionally, the appellate judges fall directly under the JAG and, unlike those assigned military justice duties in the Office of the JAG, judges are not subject to the control of the AJAG. OJAG Organization Manual § 107. *For these reasons, although we find nothing actually inimical to our independence in this arrangement, arguably a reasonable observer may conclude that it is inappropriate for an officer whose duties do not include supervising the Court's judges, but whose professional responsibilities are so directly and closely affected by the Court's decisions, to participate in the evaluation of the appellate judges.*[14]

The standard for deciding the Manual judicial-disqualification question is the same as that provided in the Federal judicial-disqualification statute (§ 455) upon

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[14]This opinion is not the place to develop administrative measures to cure an appearance problem arising from the fitness report preparation process. *Suffice it to say that we acknowledge that such an appearance may exist,* and we urge the Judge Advocate General to examine the process with a view to ensuring that those who participate in it occupy positions less directly affected by the decisions of this Court. In addition, we share Judge Reed's belief, in his concurring opinion, that defining specific criteria for the evaluation of military judges would remove some of the mystery and uncertainty about the process and would lessen the possibility that a judge will leave this Court believing that he has paid a high professional price for his judicial decisions.

We also invite the JAG's attention to two other aspects of the process that may contribute to an unhealthy appearance: (1) The AJAG is included with the Court's Marine judges for comparison rankings, yet he is the officer who submits recommendations for their reports, and (2) the reviewing officer for Marine judge fitness reports is the Assistant Commandant of the Marine Corps. In our opinion, the latter feature is not consistent with the concept of judicial independence and the inherent conflict in the first aspect tends to detract from the integrity of the fitness report process as a whole.

(Most emphasis added.)

which it is based. *Id. Cf. Liteky v. United States*, 127 L. Ed. 2d 474, 114 S.Ct. 1147 (1994). *See* Manual, *supra* at A21-45. *See generally Liljeberg v. Health Service Acquisition Corp., supra*. The test is whether a reasonable person *who knew all the facts* might question these appellate military judges' impartiality. *See United States v. Kincheloe*, 14 MJ 40, 50 (CMA 1982); *United States v. Couch*, 896 F.2d at 82. *See also Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir. 1986), modified in part, 796 F.2d 100 (5th Cir. 1986). Moreover, this Court, in addressing similar appearance questions, has repeatedly recognized that we cannot close our eyes to "everyday, even necessary circumstances in the life of Judge Advocate General Corps Officers."[5] *See United States v. Hurt*, 9 USCMA 735, 754, 27 CMR 3, 22

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[5]Judge Reed also noted other ways that the Judge Advocate General might affect an appellate judge's career, as follows:

> A Judge Advocate General has sat on a Commander to Captain promotion board; has sat on boards convened to selet Navy JAG Corps officers for involuntary early retirement; has sat on boards convened to recommend to the Secretary of the Navy the appointment of a Marine Corps officer to serve as the Director, Judge Advocate Division, a general officer (O-7) billet and the senior lawyer in the U.S. Marine Corps; has sat on a promotion board to recommend to the Secretary of the Navy that a Marine Corps judge advocate be assigned as the Assistant Judge Advocate General of the Navy (Military Justice) and be eligible to retire as a general officer, with the rank, grade, and pay of such pursuant to 10 USC § 5149(c); has detailed Navy judge advoctes to sit as the Assistant Judge Advocte General eligible to retire as a flag officer pursuant to 10 USC § 5149(c); and details judge advocates to this Court, upon recommendation of a screening board, and upon termination of such assignments, approves the reassignment of Navy judges to other billets within the Judge Advocate General's Corps, unless such judge retires.

37 MJ at 923 (footnotes omitted).

(1958). *See also Weiss v. United States*, 114 S.Ct. at 760, citing Middendorf v. Henry, 425 U.S. at 43.

IV

REASONS FOR DENYING MANUAL CLAIM

In considering the import of the Court of Military Review Judges' comments[6] for purposes of RCM 902-(a), we initially note that they fall far short of the required finding for disqualification. The judges below only acknowledged that a reasonable argument could be made that the administration of the fitness-report system in and of itself is "inappropriate." They did not find, however, that a reasonable person knowing *all the facts and circumstances* about that system could question their impartiality or independence in reviewing appellant's case. In addition, for the salient reasons

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[6]The judges of the Court of Military Review are not parties in this court-martial case. However, two of the judges below also attempted "to set the record straight" (37 MJ at 917 and 918) by responding in their separate concurring opinions to certain factual representations made in post-trial affidavits submitted by the parties. *But see* RCM 902(b)(3), Manual for Courts-Martial, United States (1984). *See* J. Shamen, S. Lubet, and J. Alfini, *Judicial Conduct and Ethics* § 5.13 at 121 (1990) (Disqualification of "Judge ... as a Witness"). On the contrary RCM 902(d)(2) provides: "Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter."

We note that appellate defense counsel made no motion before, during, or after the Court of Military Review's decision was issued in this case to disqualify these judges. See RCM 902(d)(1). Moreover, when questioned during oral argument on this matter, appellate defense counsel indicated no concern for this irregular procedure. *See* RCM 801(g). *Cf.* RCM 902(e). Finally, we have closely examined these concurring opinions and disregarded any comments by these judges which might be considered testimony in this case. Art. 59(a), UCMJ, 10 USC § 859(a).

stated in *United States v. Graf, supra*, we hold that a reasonable person could not question the impartiality of the appellate military judges in this case.[7]

The first fact or circumstances of which a reasonable observer would be aware is that he is assessing the impact or possible impact of this fitness-report system on a military judge. See Art. 26(c), UCMJ, 10 USC § 826(c). The latter is a military officer who has sworn to do his duty under law, see 5 USC § 3331, and has taken an oath to dispense justice "impartially," see Art. 42(a), UCMJ, 10 USC § 842(a); RCM 807(b)(2), Discussion. *See also United States v. Hubbard*, 20 USCMA

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[7]A trial judge or an appellate military judge must apply this standard in determining whether he should disqualify himself on request of a party or on his own motion. RCM 902(a). *See generally Liteky v. United States*, 127 L. Ed. 2d 474, 114 S.Ct. 1147 (1994). In reviewing their decisions on these questions, appellate courts normally employ an abuse-of-discretion standard. *See generally* S. Childress and M. Davis, *Federal Standards of Review* § 12:05 at 12-35: Judicial Disqualification (2d ed. 1992). However, the appellate standard for determining an abuse of discretion by a trial judge may vary in the different United States Courts of Appeals. (1) *In Re United States*, 666 F.2d 690, 695 (1st Cir. 1981)(no reasonable person could likewise conclude). (2) *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989); *Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1567 (Fed.Cir. 1989)(clear error of judgment), *cert. denied*, 493 U.S. 1076, 107 L. Ed. 2d 1031, 110 S. Ct. 1125 (1990). (3) *United States v. Diaz*, 797 F.2d 99,100 (2d Cir. 1986); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co. Inc.*, 690 F.2d 1157, 1161 (5th Cir. 1982), *cert. denied*, 464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983); *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) [no reasonable basis in record of trial]. (4) *Johnson v.*
Trueblood, 629 F.2d 287, 290 (3d Cir. 1980), *cert. denied*, 450 U.S. 999, 68 L. Ed. 2d 200, 101 S. Ct. 1704 (1981); *United States v. Carmichael*, 726 F.2d 158, 161 (4th Cir. 1984); *In Re Hale*, 980 F.2d 1176, 1178 (8th Cir. 1992); *Yagman v. Republic Insurance, Inc.*, 987 F.2d 622, 626 (9th Cir. 1993) [no definition of abuse of discretion]. (5) *See also United States v. Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). To avoid any issue in this regard, we decide this question, "*de novo*" in the present case. *See United States v. Graf*, 35 MJ 450, 465-66 (CMA 1992), *cert. denied*, 127 L. Ed. 2d 206, 114 S.Ct. 917 (Jan. 24, 1994).

482, 43 CMR 322 (1971)(defense counsel not disqualified because fitness-report endorser was trial counsel). *Cf. United States v. Deain*, 5 USCMA 44, 52-53, 17 CMR 44, 52-53 (1954)(permanent members of court-martial panel disqualified because president of panel prepared fitness reports on that duty). Surrender to such a temptation would not only constitute a judicial ethical violation but it could also expose these military officers to criminal liability under the Uniform Code of Military Justice. Arts. 92(1) and 133, UCMJ, 10 USC §§ 892(1) and 933, respectively. *See United States v. Graf, supra* at 463; *NMCMR v. Carlucci*, 26 MJ at 336.

The second fact or circumstances that a reasonable observer would be aware of is that the fitness report, no matter who it was prepared by or signed by, could not consider the judge's findings or sentencing decisions. *United States v. Graf*, 35 MJ at 465; *United States v. Mabe, supra*; *see Weiss v. United States*, 114 S.Ct. at 763 n.7; *see also United States v. Martinez*, 11 USCMA 224, 29 CMR 40 (1960). In the absence of some evidence to the contrary, we must presume not only that the Judge Advocate General and his assistant know the law but also that they follow it. *E.g., United States v. Mabe*, 33 MJ at 206. *See generally Withrow v. Larkin*, 421 U.S. at 47 ("presumption of honesty and integrity in those serving as" administrative investigators and "adjudicators"). Accordingly, even if prosecutorial bias actually existed on the part of the JAG or AJAG, there is no reason to expect it might be exercised through the fitness-report system.

The third fact or circumstances known to the reasonable observer is that the appellate military judge has viable remedies to protect himself from untoward

influence of the Judge Advocate General or his subordinate. *United States v. Graf, supra* at 463. None of the appellate military judges availed himself or attempted to avail himself of these remedies with respect to appellant's case or with respect to the performance of his judicial duties while that case was pending. *Cf. NMCMR v. Carlucci, supra*. Moreover, no Court of Military Review judge actually disqualified himself in this case.

The fourth fact or circumstance that a reasonable person would know about the appellate review of this case is that no Court of Military Review judge has asserted a belief that the JAG or AJAG was generally biased for the prosecution. *See United States v. Graf*, supra at 463. Moreover, appellate defense counsel, while maintaining a systemic challenge to the Court of Military Review, proffers no particular reason why his appellate military judges might be otherwise biased for the prosecution in his case. *See United States v. Allen*, 33 MJ 209 (CMA 1991), *cert. denied*, 117 L. Ed. 2d 617, 112 S.Ct. 1473 (1992). The absence of such proof severely undermines appellant's argument that a reasonable person might question the impartiality of his judges at the Court of Military Review. *United States v. Kincheloe*, 14 MJ 40, 51 (CMA 1982). [8]

V

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[8]Our judgment might be different if the judges of the Court of Military Review were reviewing a case where the Judge Advocate General or the Assistant Judge Advocate General, prior to their appointment, acted as a military trial judge, trial counsel, defense counsel, or staff judge advocate in that case. *See generally United States v. Engle*, 1 MJ 387, 390 (CMA 1976).

CONCLUSION

Our particular concern in this case is whether appellant received a fair and impartial review of his court-martial by members of the Navy-Marine Corps Court of Military Review. Art. 66 of the Code. He is clearly entitled to such a review, independent both in fact and appearance, both as a matter of constitutional and military due process. *See Aetna Life Insurance Co. v. Lavoie* and *United States v. Kincheloe, both supra;* and RCM 902. Yet it is obvious to us that *the judges of the Navy-Marine Corps Court of Military Review,* at least those participating in appellant's case, are concerned about the fairness of their treatment as professional military officers. We sense dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system. *See generally Noyd v. Bond,* 395 U.S. 683, 695, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969).

Nevertheless, our recognition of their complaints does not authorize this Court to employ our appellate powers to create, revamp, or eliminate the military-officer-fitness-report system. We say again what we said in *United States v. Mabe,* 33 MJ at 206 n.6:

> The two minority judges below misconstrue the purpose of appellate review in the military justice system. It is not a vehicle to protect the professional reputation of military attorneys involved in command-influence cases. Moreover, it is not designed to implement or facilitate the routine bureaucratic functioning of the officer's fitness report system. *These are responsibilities of the Judge Advocate*

> *General of the Navy.* Art. 26(c), Uniform Code of Military Justice, 10 USC § 826(c). Our duty is to insure that servicemembers receive a fair court-martial in accordance with law. Art. 67, UCMJ, 10 USC § 867.

(Emphasis added).[9]

Of course, there is another forum in which consideration of these concerns is especially appropriate, *i.e.*, Congress. After all, it is specifically authorized to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Moreover, in the past it has considered and remedied *some of the very problems* now raised with respect to fitness reports of appellate military judges. For example, Article 66(g) states:

> (g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, *an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed*

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[9]We have been informed by the parties to this appeal that the Judge Advocate General of the Navy is considering proposed changes to this system, and we await the publication of these changes.

> *forces, or in determining whether a member of the armed forces should be retained on active duty.*

(Emphasis added.)

Finally, the President acting pursuant to Article 6(a), UCMJ, 10 USC § 806(a)(1989), might also consider these concerns. Article 6(a) provides:

> § 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges
>
> (a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position. To the extent practicable, the procedures shall be uniform for all armed forces.
>
> (b)The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committees on Armed Services of the Senate and the House of Representatives.

Thus, once again, this Court must respectfully decline to legislate by litigation. *See United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, 127 L. Ed. 2d 206, 114 S.Ct. 917 (Jan. 24, 1994).

A Federal appeals court such as ours must know

the extent of its power. A court in its role of providing justice may use relevant legislation to decide a case but must refrain from making it in the first place – that is for the legislative branch to do. In this case, the relief desired *by the Navy appellate military judges* must come by way of legislation from Congress or by way of executive regulation from the President.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge CRAWFORD concurs.

GIERKE, Judge (concurring):

I agree with Chief Judge Sullivan's resolution of the granted issue. I write separately only to elaborate on my reasons for joining the principal opinion.

I agree that the Judge Advocate General's record on certified issues does not reflect prosecutorial bias. Government counsel do not have the opportunity afforded to an appellant to petition this Court for relief from an adverse decision of the Court of Military Review. Therefore, the only opportunity for government counsel to obtain relief from an adverse decision is to request the Judge Advocate General to certify the issue. If the number of "defense" issues were anywhere near the number of "prosecution" issues certified, I would suspect that something was seriously wrong. There should be very few "defense" issues certified if appellate defense counsel are raising the right issues and this Court is granting review of the right cases. In short, the rarity of certified "defense" issues should be the norm if the system is working properly.

Finally, I do not believe that the Judge Advocate General was transformed into a prosecutor merely because government counsel claimed a work-product privilege for documents unrelated to appellant's case. Government counsel were wrong. Their client is the United States, not the Judge Advocate General.

COX, Judge (dubitante):

I have no quibble with the facts, law, and excellent reasoning set forth in the principal opinion. I simply question whether Congress intended for the

United States Court of Military Appeals to sit in abstract philosophical judgment of the structure of the military departments, especially in a case where an appellant has pleaded guilty to the charges against him and has alleged no error in his special court-martial proceedings. Given our recent willingness to entertain such systemic attacks, however, I feel certain that we will be called upon to examine many more variations on this stock theme of *Military Justice is to Justice as Military Music is to Music* by Robert Sherrill, published in 1970. I would leave questions of how the military should be organized and administered to the Executive and Legislative branches of Government, as envisioned by the Constitution.

Furthermore, in light of the following statement in *Weiss v. United States*, ___ U.S.___, 127 L. Ed. 2d 1, 114 S.Ct. 752, 762 (1994), I question whether appellant's petition was providently granted:

> Article 26 [,Uniform Code of Military Justice,] places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U.S.C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a par-

ticular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.

See also United States v. Graf, 35 MJ 450 (CMA 1992), *cert. denied*, U.S. , 114 S.Ct. 917 (Jan. 24, 1994).

Having said all that, I personally, like my sister and brothers, doubt the services' wisdom in leaving themselves open to the inevitable charge that judges are retained in service, promoted in grade, and given future assignments, at least in part, on the basis of some higher-up's approval of their performance as a judge. The irony is that the essence of good politics and government requires that civilian jurists be selected (elected/appointed), promoted, and given increased responsibilities and assignments on the basis of perceived merit. In the eyes of some, obviously, the military must be barred from attempting same.

Weiss, Judge (concurring in part, dissenting in part, and concurring in the result): [1]

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[1]Except to the extent that, on limited occasion, the text of my opinion is in conflict with Parts I and II of the majority, I concur in those Parts that dispose of appellant's constitutional argument. In that connection, I agree that our general approach in *United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, 127 L. Ed. 2d 206, 114 S.Ct. 917 (Jan. 24, 1994), controls. I dissent, however, from sections III and IV–sections that are not fairly based on our resolution of the constitutional due process issue in *Graf*. As to section V, of course I agree with the expressions of concern there. I pointedly do not agree, however, that these concerns are not a proper subject of this Court's consideration and, if need be, remedy. Appellant has argued that the flaws that I believe exist in the fitness-report system would lead a reasonable person to question the impartiality of the appellate judges who reviewed his case. Whether the fitness-report system is good or could be better, of course, is not our concern; it surely is our concern, though, whether it creates the fatal appearance that is

The majority purports to limit to the facts of this case its consideration whether a reasonable person might question the impartiality of appellate military judges who function under the Navy's officer evaluation system. In doing so, however, the majority takes giant strides in reaching conclusions that largely absolve these judges in a systemic manner. Then, finding nothing idiosyncratic about this case that is legally alarming, *but cf.* ___ MJ___ at (44) n.8, the majority gives its blessing to the decision of the Court of Military Review–but ends with reflections that not-so-subtly imply that the professional horns of a dilemma on which these appellate judges find themselves may present an appearance that is not so satisfactory, after all.

My analysis follows a similar progression but, in contrast, essentially is in the opposite direction. Regrettably, I must candidly acknowledge the serious flaws in the fitness-report system that relate to the challenge here to the appearance of impartiality of these appellate judges and then, in that context, inquire whether a reasonable person might question the judges' objectivity in this particular case. In the process, I ultimately get to the same finishing point in this case as the majority, but my course there is starkly different.

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set out in RCM 902(a), Manual for Courts-Martial, United States, 1984, and 28 USC § 455(a).

I

RCM 902(a), Manual for Courts-Martial, United States, 1984, commands: "[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Title 28 USC § 455(a), from which RCM 902(a) was borrowed, *see* Drafters' Analysis, Manual, *supra* at A21-46, substantively is identical: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As we have said: "This standard is objective. . . . Thus, the test is whether a reasonable person who knew all the facts would question [the judges'] impartiality." *United States v. Kincheloe*, 14 MJ 40, 50 (CMA 1982)(citations omitted); *accord, e.g., United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993).

It would seem, then, that the first task would be to identify our hypothetical "reasonable person." By definition, since he is in possession of "all the facts," that person is neither irrationally jaundiced against the fairness of the military justice system nor, just as importantly, dogmatically indoctrinated in support of it. Rather, the person has sufficient rationality, experience, and distance to objectively permit a view of the system through clear lenses, which hide neither the system's strengths nor its flaws.

Thus defined, what does our reasonable person think about all this? The majority relies upon four "facts or circumstances of which a reasonable observer would be aware" to justify its conclusion "that a reasonable person could not question the impartiality of the

appellate military judges. . . ." ___ MJ at (*33*). In my view, our reasonable person would not be satisfied with either the quality or the limitation of the four factors selected by the majority.

A

First, the majority points out the obvious: The person being evaluated here is a military judge–"a military officer who has sworn to do his duty under law . . . ." ___ MJ at (*33*). Such chest-pounding adds little to the balance. A similar type of claim that seems to suggest some sort of inherent integrity may be made of most any judge in most any judicial system in this country.

Morever, the reports of decisions of this Court for the past four decades are peppered with instances of honorable persons–line officers, lawyers, judges, and even high-ranking officers of the Judge Advocate General's Corps–who affected the trial or appeal of cases in ways in which they undoubtedly at the time believed were permissible but which this Court ultimately condemned. Parenthetically, while our reasonable person knows that violation of this sworn duty "could . . . expose these military officers to criminal liability under the Uniform Code of Military Justice," ___ MJ at (*33-34*), our reasonable person also knows that there is *no* reported prosecution of *any* officer for *any* of the transgressions just mentioned.

Thus, the first factor upon which the majority relies begs the question: If such a person of apparent integrity who is sworn to do his duty under law is placed in a situation in which his own personal and

professional future might seem to depend upon doing his duty in a *particular* fashion, is our hypothetical reasonable person troubled by such a psychological tug of war?

Second, the majority then reminds us that, regardless of who prepares or signs a judge's fitness report, the evaluator legally "could not consider the judge's findings or sentencing decisions." ___ MJ at (*34*). I know that is the law, *see United States v. Mabe*, 33 MJ 200 (CMA 1991). Further, in the absence of contrary evidence, I am willing to presume that the Judge Advocate General and others involved in this process are men and women of integrity who know and will follow the law.

Candidly, however, the picture is far from focused as to what are the criteria on which appellate judges are rated–officers whose full-time job is to make findings and sentencing decisions. More than one judge below expressed pointed concern in this regard. *See infra*. I cannot help but wonder whether our reasonable person would be so fully assuaged as the majority when faced with the fact that, while judges cannot lawfully be rated on their findings and sentencing decisions, year in and year out they are rated against some criteria and on *some* basis–the nature of which even the appellate judges below in this case expressed uncertainty and reservations.

The third "fact or circumstance" relied upon by the majority is a legitimate consideration. True, a military judge who feels importuned upon does have legal remedies available, and to be sure judges have on occasion sought their refuge. *See, e.g., United States*

Navy-Marine Corps Court of Military Review (hereafter NMCMR) v. Carlucci, 26 MJ 328 (CMA 1988). Equally it is true that no judge in this case disqualified himself because of the fitness-report system.

I cannot help but wonder, though, whether our hypothetical reasonable person might find this a bit circular: The availability of certain protections against influence that assuredly require intestinal fortitude to invoke would not seem to offer substantial assurance that all judges who might not make that measure of fortitude could resist the improper influence. In other words, the irony is that judges who are of such character that they would invoke the remedies are the very judges who likely would resist the influence–and vice versa. After all, each of us is different from the other in the whole panoply of traits, and steeliness of resolve is no exception. I think our hypothetical person is not so naive as to be unaware of this realization.

The final factor pointed to by the majority is that no judge in this case expressed the personal view that either the Judge Advocate General (JAG) or the Assistant Judge Advocate General for Military Law (AJAG) generally was biased for the prosecution and that this appellant has pointed to nothing in particular in this case to suggest that the judges who sat on his appeal actually might be biased. That certainly is true; but, of course, if it were not, we would have little occasion to concern ourselves with appearances of partiality to our reasonable person–recusal of the judges pretty clearly would be required. *See* RCM 902(b)(1); 28 USC § 455(b)(1). Accordingly, absence of this factor likely would spell doom to the integrity of the decision below, but presence of it is not much affirmative

comfort.

In this evaluation of the majority's four considerations, I do not mean to suggest that any particular person, whether judge or Judge Advocate General, lacks appropriate strength of character to do the right thing. Neither do I mean to suggest that the four factors are not legitimate considerations. I do mean, however, to put those four factors in perspective and to put appropriate distance between particular judges and Judge Advocates General, on the one hand, and our hypothetical reasonable person, on the other-thereby achieving some measure of objectivity.

B

The majority's analysis of the reasonable person's view of this matter suffers additionally from failure to put onto the scale several other factors that the majority expressly or implicitly acknowledges elsewhere in its opinion. It suffers, too, from oversight of the public record with regard to those factors. The assault on the system no longer depends upon hypothetical horror stories; instead, the parade of horribles now is documented, and the cries for reform appear to be compelling.

Example: A former judge of the Court of Military Review, an officer with extensive military justice experience, openly and in a sworn affidavit has averred his belief that his performance evaluation-and consequently his assignments and his promotion prospects-were adversely affected by his role in *NMCMR v. Carlucci, supra*. The fact that that judge did not sit on appellant's appeal, as the majority notes, does not detract from the

impact of this document on the shaken confidence in the system of our reasonable person.

Example: The then-AJAG has sworn in his own affidavit that, when he told this same judge that he was being reassigned from the court at a point well short of the usual 3-year tour of duty, *but see United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. denied*, 127 L. Ed. 2d 206, 114 S.Ct. 917 (Jan. 24, 1994), that judge threatened to "use Billig[2] to prevent the move from taking place." The affiant's purported response was to return to his office and cancel the planned transfer, even though he insists that the transfer was for sound and articulable reasons other than the judge's judicial performance.

Example: The newly assigned AJAG was, before that assignment, a military judge in, presumably, a good number of cases which likely will be reviewed by the Court of Military Review while that officer is AJAG. In one such case presently pending in that court, *United States v. Larson*, NMCMR No. 92-1621, the accused has challenged several rulings of the military judge at his court-martial. Thus the mix: The military judge who the Court of Military Review is being asked to hold committed prejudical error is now the officer who writes the fitness reports on all judges on that court for the JAG's signature and, as well, is the officer who is in the same rating group as the Marine judges on that court and who ranks himself in comparison to those judges in his draft recommendation to the JAG.

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[2]*United States v. Billig*, 26 MJ 744 (NMCMR 1988)(*en banc*), was the decision of the Court of Military Review that precipitated the events leading to *NMCMR v. Carlucci*, 26 MJ 328 (CMA 1988).

Example: The convening authority in *United States v. Larson, supra*–a case in which the accused also alleges prejudicial post-trial delay of 198 days between the end of his trial and that convening authority's action–was the same officer who now is the Assistant Commandant of the Marine Corps–the reviewing officer for the fitness reports of the Marine judges on the Court of Military Review.

Example: The various opinions below in this case, 37 MJ 903 (1993), clearly reflect the judges' substantial discomfort concerning the perception of their impartiality, given the structural flaws discussed earlier. Just a few illustrations:

> Suffice it to say that *we acknowledge that such an appearance [problem] may exist [from the fitness report system],* and we urge the Judge Advocate General to examine the process with a view to *ensuring that those who participate in it occupy positions less directly affected by the decisions of this Court. . . .*

37 MJ at 917 n.14 (emphasis added). The opinion goes on to say:

> We also invite the JAG's attention to two other aspects of the process that may contribute to an *unhealthy appearance*: 1) The AJAG is included with the Court's Marine judges for comparison rankings, yet he is the officer who submits recommendations for their reports, and 2) the

> reviewing officer for Marine judge fitness reports is the Assistant Commandant of the Marine Corps. In our opinion, *the latter feature is not consistent with the concept of judicial independence and the inherent conflict in the first aspect tends to detract from the integrity of the fitness report process as a whole.*

Id. at 917 n.14 (emphasis added). Other judges stated:

> Unless the rating and ranking of appellate military judges is accomplished by the Judge Advocate General based on clearly stated criteria applicable to their unique, independent function in the military (*and only with the assistance of persons having no arguable interest, official or otherwise, in the outcome of cases before the Court), military appellate review will not enjoy the confidence in its integrity and independence that Congress and the public require. . . .*

Id. at 921 (Mollison, J., joined by Orr, S.J., and Lawrence, J., concurring in part and in the result)(emphasis added). Another judge stated:

> Thus, when the JAG needs input on the performance of military appellate judges he logically turns to the person he has designated as responsible for military justice matters, the AJAG. *However, because of his own interest in the outcome of the fitness report system and his possi-*

> *ble disagreement with opinions from this Court, in submitting recommendations the AJAG is placed in an untenable and possibly compromising position.*

Id. at 930 (Reed, J., concurring in the result)(emphasis added).

Example: Even though this Court in *United States v. Mabe*, 33 MJ 200 (1991), held that military judges may not be rated in their fitness reports by using their decisions and sentencing as benchmarks, military judges (trial and appellate) continue to be rated "in several key areas of performance, including some arguably relevant to this issue, such as loyalty (USMC), cooperation (USMC), organizational support (USN), working relations (USN), and judgment (both)." 37 MJ at 905. Yet, as suggested earlier in this opinion, it is far from clear how a judge's fitness can overlay these yardsticks without violating Mabe, and the appellate judges below at several points expressed such uncertainty as to precisely *how* and upon what lawful *bases* their performance is evaluated. *See, e.g.*, 37 MJ at 917 n.14; at 921 (Freyer, S.J., concurring); at 924 (Reed, J., concurring in the result). One judge even went so far as to suggest:

> The practice of ranking appellate judges should be discontinued. *In the absence of specific objective criteria, "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done" and would perceive an appearance of command influence.*

37 MJ at 930-31 (Reed, J., concurring in the result)(footnote omitted).

In a letter to the President of the United States dated July 21, 1992, the American Judges Association submitted:

> It is the sense of the American Judges Association that our Judicial Brethren [in uniform] are not adequately protected from the bureaucracy of the military organization under existing service personnel policies and applicable legislation . . .

I have attached a copy of that letter as Appendix A to this opinion so that all may see for themselves that this group of largely state and local civilian judges has a sound grasp of the military justice system and a reasonable, moderately expressed sensitivity to the imperative of judicial independence–and to the perception of compromise of that imperative in the instance of military judges. The force of the views and to the call for reform from an organization such as this is imposing.

That is the documented, public record. It can no longer be claimed, in the face of such stark evidence to the contrary, that the present structure does not have the potential for corroding confidence in our system of justice.

C

As was reported in the January 1993 issue of *Military Justice Gazette* (published by the National

Institute of Military Justice), the Chief Judge of this Court requested an advisory opinion from the Committee on Codes of Conduct of the Judicial Conference of the United States in June 1992. The opinion he sought addressed what he described as a "serious conflict of interest in the judicial reappointment system of our Court" that "was exposed in 1990 by the Federal Court Study Committee" and that has been "recognized" by the "American Bar Association and other public entities."

"In order to reduce the conflict to practical application," the Chief Judge posed a hypothetical situation to the Advisory Committee. The full text of the Chief Judge's letter and the response from the Advisory Committee may be read in the copy of the *Gazette* that is Appendix B to this opinion.

In essence, the hypothetical portrayed a Judge of this Court who is near the end of the Judge's term of office and who desires reappointment. The Judge realizes that the Department of Defense (DoD), a component of which is a party in every case before the Court, "has the responsibility for recommending to the President individuals to be appointed to" this Court; and the Judge is concerned that the "pending reappointment request will be perceived as a personal bias toward the Department of Defense" in a very-high-visibility case on which the Judge soon will sit-an adverse decision in which might "seriously undercut" a top-level, controversial DoD policy.

The Advisory Committee responded, in pertinent part, as follows:

> Canon 3C(1) of the Code [of Conduct for United States Judges, which the United States Court of Military Appeals has adopted], provides that a judge should recuse in any case in which the judge's impartiality might reasonably be questioned. We believe that a litigant opposing the Department of Defense in a case before your court might reasonably question the impartiality of a judge to sit on his case when the judge is seeking the approval of the Department of Defense for the judge's reappointment. Accordingly, we would advise that Canon 3C(1) requires recusal in the situation you describe.

It is not immediately apparent to me how the personal and professional predicament in which the Court of Military Review judges are placed is any less compromising. The difficulty is not in whether either the Judge on this Court in the scenario described to the Advisory Committee or a judge on the Court of Military Review in the context that I have set forth actually is swayed. Rather, it is whether, from an objective viewpoint, a reasonable person would question the judge's impartiality.

By way of postscript of sorts to my treatment of the appearance problem that engulfs the fitness-report system applied to Navy and Marine appellate judges, let me conclude by quoting the following reflection and exhortation from the separate opinion below by Senior Judge Freyer:

> The old (and quaintly gender-specific) fitness report form, NAVPERS 1611/1 (Rev. 12-69), contained a marking category called "moral courage," which it defined as "To do what he ought to do regardless of consequences to himself." When all is said and done, that is what was required of a military trial or appellate judge before *Mabe* and *Graf*, and it is equally required now. As desirable as moral courage may be, however, the presupposition that there should be adverse consequences to oneself for doing what one ought to do suggests that something is wrong. The administrative framework in which the military judiciaries operate should promote judicial independence affirmatively, not by taxing the moral courage of the judges to compensate for adverse structural conditions, which, by their very existence, create a perception of judicial self-interest in the outcome of decisions among the judges themselves, accused, and members of the public.

37 MJ at 921.

II

Two different approaches suggest themselves toward resolving this issue. The first is to acknowledge the flaws in the fitness-report system that relate to the challenge here to the appearance of impartiality of the appellate military judges and proceed to determine, in each and every case and in the unique context of that

case, whether indeed a reasonable person might question the judges' impartiality in light of those flaws. The second is to acknowledge those same flaws and to conclude that they constitute such a serious compromise of the insulation of neutrality that should enshroud the Court of Military Review that they permeate the whole atmosphere in which the judges of that court do their work and thereby undermine the appearance of reliability in their decisions. *See United States v. Allen*, 33 MJ 209 (CMA 1991); *United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085, 94 L. Ed. 2d 146, 107 S. Ct. 1289 (1987).

Ultimately, I am persuaded that a case has not been made that warrants the second approach. As the majority opinion points out in a footnote, ___ MJ at (44) n.9, we have been assured by counsel for the Government that changes are underway that purportedly will address the more glaring problem areas in this system of fitness reports for the judges. In this context of apparent efforts to resolve the problem, I am willing to restrain the scope of judicial probing to those cases in which an appellant urges that his review by that court has been compromised in some manner by the problems uncovered here.

As the majority indicates, this appellant has made no such special claim here. Although our hypothetical reasonable man knows all of the facts and circumstances that I have discussed, supra, I am satisfied that nothing about this particular case should cause him to question the objectivity that the appellate military judges brought to their consideration of this appeal. On that basis, I join the disposition ordered by the majority.

APPENDIX A

American Judges Association

Serving the justice system since 1959

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July 21, 1992

President George Bush
Commander-In-Chief
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear President Bush:

I submit the attached Resolution of the American Judges Association (AJA) for consideration in my capacity as the Association's President. In behalf of the Association, which boasts a membership of approximately 3,000 Judges, we request that you initiate action to eliminate perceptions which exist in the current military justice system that military judges are not independent. The AJA takes the position that this perception is fostered by the lack of tenure for military judges, and the military promotion and retirement systems as they presently impact on military service judges. The personnel systems create perceptions that officers selected for, and assigned to judicial duties, do not promote at the same rate as contemporaries, and that they are selected for early retirement at a higher rates than contemporaries.

Tenure for Military Judges is a concept that has been argued before the highest Court within the Military Courts System. (United States v. Ronald D. GRAF, U.S.C.M.A. Dkt. No. 66766/NA). I have attached a copy of a recent news article which describes the April 7 arguments on the issue of tenure before the United States Court of Military Appeals.

In each of the services, Military Judges are screened for judicial temperament before they are selected for judicial duties. Thereafter they are trained and assigned to the service Trial Judiciary where they sit as judges. They are professionals who must exercise independent judicial discretion to ensure defendants, and the Government, are treated fairly in Court-Martial proceedings. The perception is that without tenure, a military judge is subject to transfer from the service judiciary should he/she render unpopular evidentiary rulings, findings, or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command.

Similarly, the perception exists that judges who make rulings unpopular with military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selections for promotion.

To protect military judges from the possibility of such action, we are of the opinion that a legislative "fix" should be passed to eliminate the perception that a military judge could fall victim to retribution because of unpopular judicial decisions. In the day of the declining military presence and involuntary selective early retirements for military personnel, it is recommended that officers screened and selected for Judicial assignments at the rank of Lt Colonel/Commander be exempt from the Selective Early Retirement program, and that, as members of the Judicial Profession, they be guaranteed promotion to O-6 (Colonel or Navy Captain) and tenure to complete a 30 year career, should the Judge elect to remain on active duty, as a Judge, until he or she reaches the 30 year mandatory retirement date.

In the alternative, or in conjunction with the foregoing recommendation, a legislative "fix" should be considered wherein the Chief Judges of the service Trial Judiciaries, and the Chief Judges of the Service Appellate Courts be: 1) selected as General/Admiral (O-7) to ensure that they are immune to the pressures of service promotion and retention systems, or 2) that the Chief Judges be retired at the rank of General/Admiral (O-7), with or without retired pay at the rank of General/Admiral.

It is the sense of the American Judges Association that our Judicial Brethren are not adequately protected from the bureaucracy of the military organization under existing service personnel policies and applicable legislation. To achieve separate, independent status the AJA deems healthy for any Judiciary, the 145 or so officers presiding over the criminal trials must be guaranteed a capability to function within, but independent of the military organizations they serve.

Military Judges are a small group of professionals, selected and designated as Judges to ensure that the perceived evils of the military justice system, as manifested in some notorious trials of the past, cannot occur in modern time.

Because these dedicated men and women deviate from a normal career pattern in order to ensure justice within the military community, they should enjoy protected careers, just as they protect the rights of persons and parties appearing in their courts. Guaranteed promotions, based on the judicial selection process, and assured status (tenure) until retirement is not too much to urge on the lawmakers and policy makers of our great nation.

Respectfully,

Richard Lee Price

APPENDIX B

MILITARY JUSTICE GAZETTE

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No. 5 | Washington, D.C. | January 1993

NEW BOOKS

Two new books have appeared on military justice. The first is Professor David A. Schlueter's third edition of *Military Criminal Justice: Practice and Procedure*, available from Michie Company, in Charlottesville. The other is the first volume of *Army Military Justice*, Professor Jonathan Lurie's history of the Court of Military Appeals, published by Princeton University Press. The title of volume one is *The Origins of the United States Court of Military Appeals, 1775-1950*. Volume two is in progress. On a sadder note, we now report that, as feared, the *Military Law Reporter* has been discontinued as a result of reduced subscriptions.

BAR NEWS

Gazette No. 4 reported that Coast Guard appellate defense counsel G Arthur Robbins (now in private practice) had submitted to the Joint Service Committee on Military Justice a proposal for *Manual* changes. A report and recommendation on this subject by the ABA Standing Committee on Military Law will be considered by the House of Delegates in Boston in February. Report No. 107A urges amendment of RCM 1112 and 1201(b) "to ensure that convicted service members have the right to review and comment on all stages of military administrative review of their case" and amendment of RCM 1203(c) "to provide for the opportunity for convicted service members to review and submit petitions to the appropriate service Judge Advocate General for certification of a case to the United States [Court] of Military Appeals."

E STREET

1. *Advisory Opinion of Judicial Conference Committee on Codes of Conduct.*

June 22, 1992

To the Committee on Codes of Conduct of the Judicial Conference of the United States

Dear Judge and Committee Member:

I request an advisory opinion on a conflict of interest question that could appear before the Court on which I sit. This advice will help me devise legislation to resolve the perceived conflict. Some background information. I am the Chief Judge of the only Article I Federal appeals court. Our Judges serve a 15 year term and can be reappointed by the President with the Advice and Consent of the Senate. As you know, our jurisdiction covers criminal appeals from Federal convictions by court martial in the Armed Services. There are usually only two parties in every appeal, the appellant (servicemember) and the Government (the Department of Defense). Some of the cases we review involve the most serious Federal crimes including murder, rape, and espionage. I am told we now have nine capital murder cases in the military justice system. In each of the past two years we have handled a death penalty case. Congress has given the Chief Justice the power to designate Article III judges to sit on our Court in the event of a recusal of one of our Judges. This recusal procedure has been easily utilized several times in the last two years and with great success. Judges Sentelle, Wilkins, and Spottiswood have sat with our Court using this procedure.

A serious conflict of interest in the judicial reappointment system of our Court was exposed in 1990 by the Federal Court Study Committee. The American Bar Association and other public entities have also recognized and are concerned with this conflict of interest. In order to reduce that conflict of interest to practical application, I seek an advisory opinion of the Committee on Codes of Conduct for the following question:

> A United States Court of Military Appeals Judge (56 years old) is in the 14th year of her 15 year term appointment. The Judge is eligible and qualified for reappointment and has decided to seek reappointment. It is a matter of public knowledge that the Judge has requested the Department of Defense to reappoint her pursuant to [10 USC § 942]. The Department of Defense has the responsibility for recommending to the President indi-

viduals to be appointed to any vacancies on the U.S. Court of Military Appeals.

If the Judge is reappointed, her salary would remain at the present $137,300 level. If the Judge is not reappointed, she would receive no salary and $109,800 as an annuity. The Judge learns that one of the next month's oral argument cases is an important, high visibility case for the Department of Defense. If the Government loses, the outcome of the case may seriously undercut the Department of Defense's policy banning homosexuals serving in the military. The Judge is concerned that her pending reappointment request will be perceived as a personal bias toward the Department of Defense. Should this Judge recuse herself from sitting on this case? . . .

EUGENE R. SULLIVAN

COMMITTEE ON CODES OF CONDUCT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Re: Docket No. 891 July 6, 1992

Dear Chief Judge Sullivan:

You ask our advice as to whether a judge of your court should recuse him or herself in a case involving the Department of Defense where the judge's 15-year term on the court is about to expire and the judge has made known a desire to be reappointed. You advise that, as a matter of consistent practice, reappointments to your court are made by the President only upon recommendation of the Department of Defense and that while a retired judge of your court is entitled to a pension, that pension is substantially less in amount than the salary a judge would receive as a result of a reappointment to your court. You further indicate that the judges of your court have (1) adopted the Code of Conduct for United States Judges as a source of standards of conduct for judges of your court and (2) requested our Committee to give advice regarding the application of that Code upon the request of any member of your court.

Canon 3C(1) of the Code provides that a judge should recuse in any case in which the judge's impartiality might reasonably be questioned. We believe that a litigant opposing the Department of Defense in a case before your court might reasonably question the impartiality of a judge to sit on his case when the judge is seeking the approval of the Department of Defense for the judge's reappointment. Accordingly, we would advise that Canon 3C(1) requires recusal in the situation you describe.

WALTER K. STAPLETON

2. *Judicial Terms of Office.* The Court ruled in *United States v. Graf* that due process does not require that judges have fixed terms of office. A petition for certiorari was filed on December 28, 1992.

3. *Judicial Appointments.* In *United States v. Weiss*, the Court on December 21, 1992 rejected the contention that the arrangements under which military trial and appellate judges serve violate the Appointments Clause of the Constitution. There were four opinions, none of which commanded a majority. The vote to affirm was 3-2.

RULE CHANGE PROPOSALS

The Appellate Government Division of the Navy-Marine Corps Appellate Review Activity is proposing a change in the Court's Rules regarding the precedential effect of memorandum actions. It is to be assumed that this proposal, the National Institute's January 1992 proposal concerning petitions for review that cite no errors, and a suggestion that the time limit for extraordinary relief petitions should not apply to *error coram nobis* will be referred to the Rules Advisory Committee.

* * *

National Institute of Military Justice
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13406 Sand Rock Court
Chantilly, Virginia 22021

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APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

EN BANC

UNITED STATES

v.

ANDREW MITCHELL, JR. 459-31-7144
Aviation Boatswain's Mate (Launching and Recovery Equipment) Second Class (E-5)
U.S. Navy

NMCM 92 1933

PUBLISH
Decided 24 May 1993

Sentence adjudged 17 June 1992. Military Judge: N.D. Krogmann. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Air Station, Pensacola.

LT ALICE B. LUSTRE, JAGC, USNR, Appellate Defense Counsel

CAPT LAULIE S. POWELL, USMC, Appellate Government Counsel

AMICUS CURIAE: Members Opposed to the Maltreatment of Servicemembers, Richard T. McNeil, Esq.
JUDGES: EN BANC. Mollison, Orr, Lawrence, Reed

OPINION BY: DAVID C. LARSON

OPINION OF THE COURT EN BANC

LARSON, Chief Judge:

Pursuant to his pleas, the appellant was convicted by special court-martial of wrongful disposal of military property, theft of military property, and two instances of indecent behavior, in violation of Articles 108, 121, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 908, 921, and 934, respectively. He was sentenced by the military judge, sitting alone, to reduction to pay grade E-1, forfeiture of $500 pay per month for 4 months, and a bad-conduct discharge. The sentence was approved by the convening authority.

On appeal, the appellant asserts that he cannot receive a fair and impartial review by an independent appellate court, as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.[1] His challenge to the independence of this Court is based on the fact that the performance and conduct of the military

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[1]The appellant assigns two other errors attacking the jurisdiction of his court-martial on the bases that the military judge is not guaranteed a fixed term of office and was not appointed to his position in accordance with the Appointments Clause of the U.S. Constitution. These systemic attacks on the military justice system have been resolved adversely to the appellant in prior decisions and will not be addressed. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).

appellate judges assigned to the Court are evaluated in Navy and Marine Corps fitness reports signed by the Judge Advocate General of the Navy (JAG). Because the JAG, as a senior official within the Department of the Navy, is responsible to the Secretary of the Navy for the efficient and effective administration of military justice in the Navy and Marine Corps, the appellant argues that the JAG has a vested interest in appellate decisions which preserve court-martial convictions and sentences; therefore, appellate judges risk professional adversity by issuing contrary opinions.

Appellant concedes at the outset that this attack is totally systemic in nature. He offers no evidence that the fitness report process has been used to influence any appellate judge assigned to review his case or that any judge has actually been affected by the latent threat of such use. Yet, he asserts that the mere existence of the threat--when coupled with the significance of a fitness report to a commissioned officer's career--creates an untenable conflict of interests that necessarily undermines the Court's independence. Recognizing our inability to fix the fitness report process itself in a manner that would guarantee the Court's independence, he asks that we take no action on the findings and sentence in his case and that it (and, presumably, every case pending review by the Court) be returned to the JAG for referral to an "independent court" until appropriate officials in the Department of the Navy free the judges of this Court from this limitation on their independence.

We hold that the JAG's preparation of fitness reports for the judges of this Court does not violate the appellant's constitutional right to have his appeal decided

by an independent appellate court.[2] However, because of the fundamental nature of this attack on the integrity of the military justice system, it merits further discussion.

BACKGROUND[3]

Fitness reports are required for all commissioned officers in the Department of the Navy. This requirement is imposed by Article 1129 of Navy Regulations, which are issued pursuant to 10 U.S.C. § 6011 and have the force of law. *See Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961). Fitness reports are submitted annually and on certain other specified occasions, such as transfer. In the Navy, the fitness report requirement is implemented by Naval Military Personnel Command Instruction (NAVMILPERSCOMINST) 1611.1A of 26 March 1990, Subj: Reports on the Fitness of Officers, and in the Marine Corps by Marine Corps Order (MCO) P1610.7 of 6 November 1985, Subj: Performance Evaluation System. The latter specifically directs that reports for

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[2]The appellant's right to appellate review derives from statute, not the Constitution. Article 66(b), UCMJ, 10 U.S.C. § 866(b). However, once that right to appellate review is granted, the Due Process Clause of the Fifth Amendment requires that it be accomplished by an *independent* judicial body. *Graf.*

[3]The details in this background are included to provide an adequate factual record on which to decide this issue. The factual matter described above was developed at the appellate stage, pursuant to our fact-finding powers under Article 66(c), UCMJ, through a combination of discovery and disclosure as well as judicial notice of commonly known regulations and practices in the Department of the Navy. Unless otherwise indicated, the details of fitness report preparation and the identity of the participants in the process pertain to the most recent annual fitness report cycle for Navy captains and Marine Corps colonels, which ended 31 July 1992.

Marine judges comply with instructions of the JAG in addition to the policies in the Marine Corps order itself. Both directives stress the importance of the fitness report for promotion, retention, and assignment of the officer concerned. In addition, both entitle the officer concerned to review his report and, if he is dissatisfied with its contents, to submit a statement to that effect.

The fitness reports for Navy and Marine Corps officers serve not only to assess an officer's performance and conduct during the past reporting period, but also to identify his value to the Department of the Navy for the future. Although the primary function of these reports is to identify those officers best qualified to meet the leadership and technical needs of the Nation's sea services, another significant purpose is to inform the officer concerned of his deficiencies and areas where he can improve. Both directives require that the officer be counseled if his report is adverse in any category of evaluation. Both Navy and Marine Corps reports require evaluation in several key areas of performance, including some arguably relevant to this issue, such as loyalty (USMC), cooperation (USMC), organizational support (USN), working relations (USN), and judgment (both).

In addition, both fitness report directives identify the officer responsible for the submission of the report--the "reporting senior"--as the next officer senior to the evaluated officer in the chain of command who is specifically authorized by the controlling directives to submit the report. For this Court's judges, that officer has been the JAG. Judge Advocate General Instruction 5400.1A of 6 July 1992, Subj: Office of the Judge Advocate General (OJAG) Organization Manual, § 109. For Marine judges, there is an additional participant in the fitness report

process, called the "reviewing officer," who is required to review the reporting senior's submission for consistency, accuracy, lack of bias, and adherence to Marine Corps fitness report policy. MCO P1610.7. For the three Marine judges on this Court, that officer has, in recent times, been the Assistant Commandant of the Marine Corps.

Another requirement of both fitness report directives is comparison rankings with similarly evaluated officers of the same pay grade in the same organization. All presently assigned appellate judges are in pay grade 0-6. Consequently, the five existing Navy appellate judges (excluding the Chief Judge) are ranked against each other. Because of his additional administrative duties, the Chief Judge is ranked against no other officer. Marine appellate judges are ranked against other Marine Corps colonels for whom the JAG is the reporting senior. For each of the three Marine judges currently assigned, this group includes the other two Marine judges and the Assistant Judge Advocate General for Military Justice ("AJAG").

Recommended fitness reports for appellate judges are routinely prepared by the AJAG, or by his principal assistant, for submission to the JAG for review and signature. The JAG has the sole discretion to accept, modify, or reject the recommendations. Each judge has been afforded the opportunity to provide information and comments for incorporation into his report before its preparation.

Because the AJAG fills a significant role in the preparation of the judges' fitness reports, an explanation of his duties is in order. He is generally responsible to the JAG for performance of the JAG's military justice duties under the UCMJ, the Manual for Courts-Martial (MCM),

and Judge Advocate General Instruction 5800.7C of 3 October 1990 (JAGMAN). OJAG Organization Manual, § 107. In this capacity he supervises the Director, Criminal Law Division, and is responsible for that officer's performance of his duties. *Id.* The duties of the Director, Criminal Law Division, include drafting legal and policy advice for the JAG on military justice matters; reviewing legislative and regulatory proposals affecting military justice; reviewing all decisions of military appellate courts for systemic malfunction; staffing JAG certification of issues for appellate review; and providing timely guidance to all military justice practitioners in the Department of the Navy. *Id.* The AJAG also serves as the Officer-in-Charge, Navy-Marine Corps Appellate Review Activity (NAMARA). In that capacity, he is responsible to the JAG for the administrative processing of courts-martial under Articles 66, 67, 69 and 73, UCMJ. This general responsibility includes, *inter alia*, receiving cases from the field and preparing them for review by this Court and by the Court of Military Appeals; issuing mandates and orders directed by the appellate courts; and supervising appellate counsel for the appellants and the Government.

Having stated the relevant circumstances, we now consider whether the JAG's preparation of the appellate judges' fitness reports (including the manner in which they are prepared) violates the appellant's right to have his case reviewed by a fair and impartial, i.e., an independent, appellate court. This process begins with an examination of this Court's status as an "independent" court.

JUDICIAL INDEPENDENCE

The right to have one's case heard before a fair and impartial judicial body as a matter of constitutional due process is firmly established in the law. *In Re Murchison*, 349 U.S. 133 (1955). That right has been specifically recognized as applicable to members of the armed forces at courts-martial. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). It applies with equal force to review of those courts-martial by a fair and impartial appellate court. *Id.* A fair and impartial court must be an independent court, for no judge can be fair and impartial if he has to answer to another for his judicial decisions. In fact, so intrinsic in the fairness of our system of law is the concept of an "independent court" that the first of those two words is really redundant.

Congress recognized the importance of a professional, independent judiciary in the Military Justice Act of 1968, Pub. L. No. 90-632, §§ 2(9) and 2(27), 82 Stat. 1336-37, 1341 (Oct. 24, 1968), which established, *inter alia*, military judges for general courts-martial under the direct control of the JAG. The significance of this creation was made clear in *United States v. Moorhead*, 20 C.M.A. 574, 44 C.M.R. 4 (1971), where the Court found that the Coast Guard's practice of detailing a judge advocate whose primary duty was not judging to sit as a general court-martial military judge violated congressional intent in Article 26(c), UCMJ, to establish a full-time, independent judiciary. *See also United States v. Beckerman*, 27 M.J. 334 (C.M.A. 1989)(applying *Moorhead* to disapprove the assignment of an officer to temporary duty for a fixed period of time as military judge for general courts-martial).

The same Act redesignated the "boards of review" under Article 66, UCMJ, as "Courts of Military Review" and the "members" of the new court as "appellate military judges." Although the boards of review had been functioning as appellate judicial tribunals since the enactment of the UCMJ in 1950, *United States v. Lanford*, 6 C.M.A. 371, 20 C.M.R. 87 (1955), the redesignation in the 1968 Act was more than just a symbolic gesture. It was designed "to improve and enhance the stature and independent status of these appellate bodies." S. Rep. No. 1601, 90th Cong., 2d Sess. 15, *reprinted* in 1968 U.S.C.C.A.N. 4515. The Act also granted the Chief Judge the authority to assign other appellate judges to panels and to designate them as senior judges, and removed the Court from the Office of the JAG. There is no explanation for these specific provisions in the legislative history of the Act. Nevertheless, it is reasonable to infer that they were included to create a separate judicial body, apart from the JAG's immediate staff, with responsibility for day-to-day administration assigned to the Chief Judge rather than the JAG. This explanation is consistent with the overall objective of enhancing the independence of the Court.

If any doubt as to the independent status of the Court lingered after the 1968 Act, the Court of Military Appeals resolved it in *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). In that case, the Court ordered the Inspector General of the Department of Defense not to proceed with an investigation into an anonymous allegation that this Court's judges had been improperly influenced in their appellate review of a particularly controversial case. Such an investigation threatened the independence and integrity of this Court because it intended to explore its deliberative processes. *Id.* at 336-37. The opinion made specific

reference to the binding authority of the Canons of Judicial Conduct on the judges of this Court, the first of which requires judges to uphold the independence and integrity of their courts. ABA Code of Judicial Conduct, Canon 1. The Court concluded that the proper course of action to resolve the allegation of judicial misconduct in that case would be to appoint a judicial commission to investigate--a procedure similar to that authorized by 28 U.S.C. § 372(c) for investigations of federal judges, and to the remedy suggested by the Court of Military Appeals, itself, 12 years earlier in *United States v. Ledbetter*, 2 M.J. 37, 43 (C.M.A. 1976)(allegation of an attempt by the JAG to influence a trial judge).[4] Following *Carlucci*, Congress added Article 6a to the UCMJ, which authorized the President to establish procedures for the investigation of allegations pertaining to the fitness of military judges to perform their duties. This amendment is merely the latest expression of congressional intent to preserve the independence of the judiciary.

JUDICIAL ACCOUNTABILITY

To conclude, as we do emphatically, that appellate military judges must be independent in their judicial decision-making capacity is not to say that they are not accountable for their performance and behavior. This concept of accountability is not foreign to our civilian

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[4]The Court suggested that an investigation by the JAG would have been an acceptable alternative, had he been inclined to conduct one in that case. *Carlucci*, 26 M.J. at 341 n.14. Rule for Courts-Martial 109(a) specifically authorizes the JAG to establish procedures to govern the professional supervision and discipline of military appellate judges. *See United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991) and *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984), for examples of these procedures in use at the trial and appellate levels, respectively.

brethren. Every state in the union has a procedure for investigating and resolving complaints against judges. *See Matter of Certain Complaints Under Investigation By An Investigating Committee of the Judicial Council of the Eleventh Circuit (Matter Under Investigation)*, 783 F.2d 1488, 1507 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986). Even federal judges, whose independence has more safeguards than virtually any other judicial creature (e.g., life tenure), are subject to impeachment by the Senate for "high crimes and misdemeanors," *see* U.S. Const. art. I, § 3, and art. II, § 4, and administrative control by a circuit judicial council for inability or unwillingness to carry out judicial duties, 28 U.S.C. § 332. Exercise of the judicial council's statutory authority may amount to virtual elimination of a federal judge's caseload. *Chandler v. Judicial Council*, 398 U.S. 74 (1969).

Similarly, administrative law judges ("ALJs"), who, like military judges, are not appointed under Article III of the Constitution, are accountable to their agency head for compliance with administrative and procedural requirements. *See Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (case holding limited to questions of jurisdiction and standing but contains insight into administrative controls and limitations of agency vis-a-vis ALJs); *Social Sec. Admin. v. Burris*, 39 M.S.P.R. 540 (M.S.P.B. 1988) (insubordination and disruptive behavior constitue "good cause" for removal of ALJ under 5 U.S.C. § 7521).

Accountability as a feature of judicial life is even more evident for military judges. Every appellate judge on this Court took an oath as an officer in the Navy or Marine Corps long before he assumed his position on the appellate bench. Accountability for performance of duty by officers has been a cornerstone of the sea services since this Nation

was founded. Traditionally, an officer's duty to account increases as he rises in grade because the extent of his responsibility increases as well. Practitioners of military justice know full well the principle of accountability for one's actions or failures to act, for it has often been tested through trial by court-martial. *See United States v. Grow*, 3 C.M.A. 77, 11 C.M.R. 77 (1953); *United States v. Lawson*, 33 M.J. 946 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 415 (C.M.A. 1993); *United States v. Sievert*, 29 C.M.R. 657 (N.B.R. 1958); *United States v. Levy*, 39 C.M.R. 672 (A.B.R. 1968).

As officers--indeed, as senior officers--military appellate judges cannot use the black robes of the bench as a shield against professional accountability. For example, it cannot be gainsaid that a lazy judge or one who willfully violates the Canons of Judicial Conduct or uses intemperate language should be held to account for his deficiencies notwithstanding his decisional independence. Chief Judge Everett observed in Carlucci that the failure of a military judge to abide by the Canons may even subject him to a charge of dereliction of duty under Article 92, UCMJ, and possible trial by court-martial as a result. 26 M.J. at 336.

Yet, if this fundamental principle of military life is to coexist in peaceful harmony with the equally fundamental principle of judicial independence, one cannot be used to subvert the other. A crucial feature of the statutory/regulatory schemes by which civilian judges are held accountable is protection of the *decisional* independence of the judge--as opposed to his administrative responsibilities and professional conduct. *Nash v. Califano*, 613 F.2d at 15; *Matter Under Investigation*, 783 F.2d at 1508. This feature must obviously be an integral part of any method of accountability for military judges as well, if congressio-

nal intent that they be independent is to be honored. Carlucci. A significant procedural safeguard to preserve judicial independence, at least for Article III judges, is investigation of misconduct and incompetence by a judicial body. *Matter Under Investigation*, 783 F.2d at 1508. For judges created by acts of Congress under Article I of the Constitution, investigative and disciplinary authority is generally granted to an official of the Executive Department, e.g., an agency head for ALJs, as noted above. *See Territorial Court of the Virgin Islands v. Richards*, 847 F.2d 108 (3d Cir. 1988). Similarly, for military judges, Congress expressly granted this authority to the President in Article 6a, UCMJ, who, in turn, has delegated it to the JAG. Rule for Courts-Martial (R.C.M.) 109. Regardless of where such authority is placed, it is clear in every case that it is not to be used to subvert the decisional independence of the judiciary.

So, the question is not whether the military judges assigned to this Court are accountable for their performance and behavior; it is whether the means used to hold us accountable tends to subvert our independence. Before we answer that question, it is appropriate to examine the role of the officer who holds us accountable--the Judge Advocate General--as well as the principal means he uses to do so--the fitness report.[5]

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[5]We note the absence of any express authority for the JAG to prepare our fitness reports. The Navy and Marine Corps fitness reports directives identify the reporting senior as an officer exercising command authority over the officer concerned. Whether there is a command relationship between the JAG and the Court's judges is not clear, considering the Court's independent status. Article 66 of the UCMJ, as amended by the Military Justice Act of 1968, offers little insight in this regard for it states only that the JAG "shall establish" the Court but says nothing more indicative of a command relationship. The legislative history of the Act recognizes that he would evaluate trial judges, but no mention is made of appellate judges.

THE JUDGE ADVOCATE GENERAL

The JAG is a creation of federal statute, 10 U.S.C. § 5148, which assigns him responsibility for "legal matters" in the Department of the Navy as well as those specific duties assigned him under the Uniform Code of Military Justice. Under Navy Regulations, he is assigned to the Office of the Secretary of the Navy and is specifically tasked with, *inter alia*, the duties of supervising the provision of all legal advice and related legal services throughout the Department of the Navy, and with providing legal and policy advice to the Secretary on military justice matters. U.S. Navy Regulations, 1990, art. 0331. In addition, the JAG is designated as the Chief of the Judge Advocate General's Corps and, in that capacity, is the principal advisor and sponsor of matters concerned with the officers in the Corps. *Id.*, art. 1009.

The UCMJ authorizes the JAG to perform a variety of functions, which in sum total describe his role in the military justice system as a crucial one. Specifically, under Article 6, assignments of all judge advocates in the Navy, including trial and appellate judges, are made upon his recommendation. Article 6(b) also establishes the right of any staff judge advocate in the field to communicate directly with the JAG. Under Articles 26 and 27, military judges and trial and defense counsel must be certified by him before they can practice in courts-martial, authority

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The OJAG Organization Manual describes the Court as a "field activity" of the JAG and states that the Chief Judge "reports" to the JAG. Based on this administrative relationship and the applicability of the JAG's authority over trial judges by analogy as well as the fact that, under Navy Regulations, someone has to submit our fitness reports, we can reasonably conclude that the JAG is the appropriate official to do so.

that necessarily implies the concomitant authority to decertify. Noted earlier was his mandate to establish this Court and appoint its judges under Article 66. Article 67 grants him the authority to refer issues of law to the Court of Military Appeals, as does Article 69 with respect to the Court of Military Review. Article 69 also assigns the JAG the responsibility to determine legal and factual errors in all courts-martial which are not subject to review under Article 66. Finally, the JAG is authorized to grant a new trial under Article 73. Furthermore, under departmental regulations, the JAG acts for the Secretary of the Navy in the exercise of many of the latter's powers under the UCMJ. For example, in the name of the Secretary, he grants convening authority status to various commanders pursuant to Article 22(a)(6). JAGMAN § 0115.

From this cursory review of the JAG's statutory and regulatory authority, it is apparent that he is more than an administrative functionary in the military justice system--indeed, he is the linchpin that holds the system together and, most important, the key to its integrity. Congress, as well as the Secretary in the exercise of his statutory authority, has bestowed considerable trust and confidence in the JAG to ensure that the system works as designed: fairly, effectively, and in accordance with the law. It has conferred upon him judicial or quasi-judicial responsibilities in the court-martial arena that require him to stand apart from either party to the case. *United States v. Monett*, 16 C.M.A. 179, 180 n.1, 36 C.M.R. 335, 336 n.1 (1966). Even in the exercise of his administrative functions, he must be fair and even-handed or the overall system of justice in the Naval Service--*for which he bears considerable responsibility*--will suffer.

With regard to his supervision of military judges in

particular, the JAG is duty-bound to preserve their independence if he is to remain true to the congressional intent behind the Military Justice Act of 1968. Indeed, that is preciseiy why military judges were removed from line control and brought under the direct supervision of the JAG. *Moorhead*, 20 C.M.A. at 578, 44 C.M.R. at 8; *Ledbetter*, 2 M.J. at 42. Furthermore, the appellate courts have shown no hesitation in emphasizing the duty of the JAG (or his designee) to preserve judicial independence. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *Ledbetter*. In *Graf*, the Court reaffirmed the JAG's obligation in this regard by holding that the use of his power to decertify or transfer a judge based on disagreement with the judge's findings and sentences would violate Articles 26 and 37 of the UCMJ. 35 M.J. at 465.[6] In *United States v. Martinez*, 11 C.M.A. 224, 29 C.M.R. 40 (1960), the Court found fault as well with a letter written by the JAG to a convening authority which expressed disagreement with the board of review's decision in that case.[7] Finally, the JAGMAN establishes departmental

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[6]*But cf. In Re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961), in which the Court held that it lacked jurisdiction to review an administrative decision of the Judge Advocate General of the Air Force to decertify a general court-martial law officer. The JAG's action, however, appeared to be unrelated to any particular court-martial or to the subject of judicial independence. In view of the language in *Graf*, noted above, and considering the Court's expansive view of its jurisdiction in matters involving the overall administration of military justice since *Taylor*, *see McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976), we conclude that the Court of Military Appeals would entertain such a petition today if the petitioner could show that an adverse action by the JAG had any apparent effect on the independence of the judiciary.

[7]The Court's principal concern in *Martinez* was the effect such a letter would have on the convening authority's discretion when he reviewed the findings and sentence anew, as ordered by the board of review. Nevertheless, the case is significant for what it says about the board of review's independence from the JAG's control of its opinions. Another feature of that independence

policy that the independence of military judges, unhampered by fear of undue criticism and unswayed by personal interests, will be maintained. JAGMAN § 0165c(1)(a).

FITNESS REPORTS AND THE LAW

"The lifeblood of any officer's career is his efficiency report." *United States v. Hubbard*, 20 C.M.A. 482, 485, 43 C.M.R. 322, 325 (1971)(Ferguson, J., dissenting). *See also Sanders v. United States*, 594 F.2d 804, 219 Ct. Cl. 285 (1979) (recognizing the importance of the fitness report in an officer's career). In *Hubbard*, the Court addressed the impropriety of a trial counsel endorsing the defense counsel's efficiency report. While expressing concern for the potential conflict inherent in such an arrangement, the Court found no specific prejudice because the defense counsel performed creditably in that case. As indicated by the quote, Judge Ferguson argued in dissent that the defense counsel's inherent conflict of interests in this situation created prejudice *per se*.

In other cases after *Hubbard*, the appellate courts have disapproved of similar situations where a defense counsel opposed an officer authorized to evaluate the defense counsel's performance, calling the situation, in one such case, "wholly inimical to the appearance of integrity of the military justice system." *United States v. Nicholson*, 15 M.J. 436, (C.M.A. 1983); *See also United States v. Lodi*, 22 M.J. 184 (C.M.A. 1986) (*denying pet. for review*) (Everett, C.J., concurring).

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can be found in Article 66(e), UCMJ, which *directs* the JAG to carry out the decisions of the Court, unless he exercises his option to certify the case to the Court of Military Appeals under Article 67(a)(2).

Likewise, the courts have recognized the damage to military justice inherent in the use of the fitness report to punish a member or a witness for his or her role in the court-martial process. *United States v. Deain*, 5 C.M.A. 44, 17 C.M.R. 44 (1954); *United States v. Littrice*, 3 C.M.A. 487, 13 C.M.R. 43 (1953); *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990). In *Mabe*, the Court made it quite clear that this proscription applies with equal, if not greater, force to fitness reports for military judges. 33 M.J. at 206.

Congress, too, has recognized the potential of the fitness report to subvert military justice. Article 37, UCMJ, prohibits the use of such reports to comment on a member's performance at a court-martial or to punish defense counsel for the zeal with which they represent accused servicemembers. In addition, Article 37 prohibits, by inference, the use of such a report to admonish a military judge for his findings or sentence. *Graf*, 35 M.J. at 465. Similarly, in Article 26, convening authorities are prohibited from using the fitness report to rate a judge on his performance in the courtroom. These same provisions are implemented in the MCM. R.C.M. 104.

While the primary purpose of the fitness report is to identify those officers best qualified for promotion, retention, and assignment to positions of leadership, its use as the primary means to hold officers (including appellate military judges) accountable for their performance of duty and professional conduct is inherent in its nature.[8] It is

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[8]We recognize that there are several other means which a senior officer may use to hold his subordinates accountable for their actions. Some are less formal than the fitness report, such as counseling and other non-punitive measures, and some have potentially more serious consequences, such as trial

intended to paint a complete picture of an officer's professional qualifications and character through a combination of objective grading of specific character traits and professional qualities, such as those described earlier in this opinion, and subjective comments in narrative form. One of the most significant entries of any report is the officer's ranking vis-a-vis other officers similarly situated, for he must ultimately compete with his peers for limited promotion and retention opportunities. NAVMILPERSCOMINST 1611.1A.

In conclusion, there is no dispute as to the significance of the fitness report in a judge advocate's career or to the threat that it can pose to the integrity of the military justice system if it is used to subvert the independence of a military judge.

ANALYSIS

There are three ways to describe and then analyze the appellant's position. First, his argument bears striking resemblance to an allegation that the judges on this Court have been subjected to a form of unlawful command influence, systemic in nature, through the unspoken threat of an adverse fitness report. Second, his assertions, if true, might establish grounds for the judges to disqualify themselves, pursuant to R.C.M. 902 and 28 U.S.C. §§ 144 and 455, based on a "personal" interest in affirming the proceedings below to please the officer who prepares their fitness reports. Third, there is his expressly stated basis--

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by court-martial. These measures are usually triggered by specific incidents or criteria and are generally discretionary in nature. The fitness report is the only *required, routine assessment* of an officer's strengths and weaknesses.

an alleged denial of constitutional due process.[9]

The constitutional due process analysis of this issue seems most appropriate for two reasons. First, it was the means by which the Court of Military Appeals resolved a similar systemic attack based on the lack of fixed terms for judges in *Graf*, 35 M.J. at 455. Second, if the appellant is to prevail in his effort to convince this Court to invalidate the statutory underpinnings of the JAG's authority to prepare the judges' fitness reports, it would have to be on constitutional grounds.

We begin by noting that the system of military justice which permits the two fundamental principles of judicial independence and judicial accountability to coexist is a creation of the Congress. The UCMJ specifically recognizes the existence of the "military judge," in lieu of the generic term "judge." Inherent in that term is a recognition by the Congress that these officers, like everyone in uniform, would be subject to military orders and professional evaluation, but that these features of military life must not be permitted to interfere with their independence as judges. The balance struck by the Congress between these two potentially conflicting dynamics is clearly reflected throughout the UCMJ, e.g., Articles

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[9]These different frameworks are, of course, interrelated and it is probable that a thorough legal analysis of any of them would lead to the same result as that of any other. We find the unlawful command influence framework not particularly suitable because no specific evidence that the JAG has attempted to influence the Court has been introduced and the case law that has addressed this matter generally requires such evidence to "raise the issue" at the outset. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987). The same requirement for some evidence of real–as opposed to potential or abstract–personal interest exists to trigger the need for a judge to disqualify himself. *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990).

6, 6a, 26, and 37, and in the placement of the JAG at the helm to keep the ship of military justice on course. Indeed, the legislative history of the Military Justice Act of 1968 refers to a congressional intent that general court-martial judges be "responsible only to [the JAG] or his designees for direction and *fitness ratings*." S. Rep. 1601, 90th Cong., 2d Sess. 7 (1969), *reprinted in* 1968 U.S.C.C. A.N. 4507-08 (emphasis added). That same balance is an intrinsic aspect of the regulatory scheme established, pursuant to congressional authority, by the President in the MCM and in regulations of the Department of the Navy, to hold military judges accountable as officers and to simultaneously preserve their independence as judges. These regulations reflect, as well, the JAG's obligation to maintain and preserve the "integrity of judicial independence." JAGMAN § 0165(c).

Considering the congressional role described above and the Supreme Court's traditional deference to the Congress in military matters, even those involving constitutional rights, *see, e.g. Solorio v. United States*, 483 U.S. 435 (1987), we find it appropriate to follow the lead of our superior court in its analysis of the similar issue in *Graf* and apply the test in *Medina v. California*, 112 S. Ct. 2572 (1992). That test was adopted by the Supreme Court to determine whether a provision of criminal procedure that fell within the peculiar province of state law was constitutionally acceptable. Applied to this case, the Medina test is whether the JAG's evaluation in fitness reports of our performance and conduct as appellate military judges "transgresses any recognized principle of fundamental fairness." *Graf*, 35 M.J. at 464. Only if we find that it does can we conclude that the factors militating against the fitness report requirement for judges are so "extraordinarily weighty" as to justify "overcoming the balance struck by

Congress." *Graf*, 35 M.J. at 464 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 [1976]).

There is no dispute that the appellant's right to have his appeal heard by an appellate tribunal that enjoys decisional independence is a "recognized principle of fundamental fairness." *Graf.* In *Medina* terms, the only question remaining is whether the JAG's preparation of fitness reports for appellate military judges "transgresses" that "recognized principle."

Based upon the matters addressed in the previous sections of this opinion, we make the following observations. First, judicial accountability and judicial independence are not mutually exclusive concepts. *Chandler; Matter Under Investigation*, 783 F.2d at 1509; *Carlucci*, 26 M.J. at 337; *Nash v. Califano*, 613 F.2d at 15. Second, the appropriate official in the Department of the Navy to evaluate military judges and hold them accountable for their performance and conduct is the JAG. Article 6, 6a, 26, and 66, UCMJ; *Graf; Mabe*. Third, evaluation by fitness report is an authorized and traditional means in the Naval Service to hold officers (including military judges) accountable for their performance and conduct. Fourth, basing a military appellate judge's fitness report on the appropriateness of his opinions and rulings would tend to undermine the independence of that judge.

We conclude from these observations that the JAG's preparation of fitness reports for military appellate judges does not "transgress" the appellant's right to have his appeal heard by an independent judicial body *if* there are adequate assurances within the military justice system that those reports will not be based upon nor influenced by judicial opinions and rulings.

We find those assurances primarily in two distinct features of the law. First, the law proscribing the use of the fitness report to "punish" a military judge for his findings and sentence, and by inferential extension to the appellate arena for his action on the record, is clear. Article 37, UCMJ; *Mabe*, 33 M.J. at 205. A judge is presumed to know the law and to follow it. *Allen*, 31 M.J. at 602. Likewise, we presume that the JAG, who sits at the head of the judiciary, knows the law and will follow it. Second, the JAG has been assigned, by congressional mandate, the specific duty to ensure that the military justice system operates fairly and impartially and, in particular, to ensure that the *independence of the judiciary is preserved.* In other words, his professional interest in carrying out his duty under the UCMJ and our interest in performing our duty under Canon 1 of the Code of Judicial Conduct are identical. It is obvious to us, and we presume to the JAG as well, that basing fitness report marks and comments on his view of the appropriateness of judicial decisions and rulings would subvert judicial independence and would, therefore, be contrary to his sworn duty.

To be sure, an important aspect of the JAG's interest in the administration of the military justice system is that it operate efficiently, i.e., that it support rather than detract from the operational efficiency of the service. Decisions of this Court which set aside any portion of the proceedings below may impede that efficiency. (On the other hand, such action by this Court would certainly be *more* efficient than forwarding error-laden cases up to the appellate ladder only to see them reversed at a higher rung. *See United States v. Moseley*, 35 M.J. 481, 485 [C.M.A. 1992] [Cox, J. concurring]). Yet, to conclude that efficiency is the dominant force that drives the JAG's interest in

appellate results--to the detriment of fairness and legal accuracy--is to lose sight of his overall responsibility to see that the military justice system operates fairly and in accordance with the law. An independent and robust appellate judiciary is indispensable to achieving that objective.

Presumably, the same tension between efficiency and fairness that is inherent in military justice exists in federal agencies which employ ALJs to adjudicate matters under their cognizance. Yet, the statutory scheme that balances the decisional independence of ALJs with accountability for non-decisional performance and behavior has passed constitutional muster, notwithstanding the fact that allegations of interference with judicial independence by agency officials have led to considerable litigation. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953); *Chocallo v. Bureau of Hearings and Appeals*, 548 F. Supp. 1349 (E.D. Pa.), *aff'd*, 716 F.2d 889, *cert. denied*, 464 U.S. 983 (1982).[10]

To counter the presumption that the JAG would not violate his duty to preserve the Court's independence through misuse of the fitness report, the appellant offers an

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[10]In one sense, administrative law judges enjoy greater institutional protection from their agency than military judges, because ALJs are not subject to performance appraisals–the federal civil service equivalent of fitness reports. 5 U.S.C. §§ 4301-02. Yet in another, arguably more significant, aspect, they enjoy less. Their opinions on matters of law and agency policy have been held to be "advisory" in nature and subject to agency review, *Association of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984), whereas this Court's decisions, unless reversed by a superior court, are binding on the JAG. *Martinez*, 11 C.M.A. at 227-228, 29 C.M.R. at 43-44; Article 66(e), UCMJ. One federal court has described an ALJ's decisional independence as "qualified." *Chocallo*, 548 F. Supp. at 1369. On balance, ALJs are subject to enough administrative control and accountability to establish the relevance of a comparison between their system and ours to a resolution of this issue.

affidavit submitted by a former (now retired) Marine appellate judge in which the former judge states that, after his participation in several controversial and high-visibility cases in which convictions were set aside, he received fitness reports from the JAG with comments that can be described as "mediocre" at best. Affidavit of Jonathan E. Rubens at 3. Following his tour of duty on the Court, he failed selection for promotion to colonel. The inference drawn by the appellant, and apparently shared by the judge himself, is that he was punished by fitness report because of his appellate decisions. This inference is strongly disputed in affidavits submitted by a former AJAG (who prepared the judge's fitness reports for the JAG's signature, see Affidavit of Charles H. Mitchell at 9-10) and by the former Staff Judge Advocate to the Commandant of the Marine Corps (who, as the senior judge advocate in the Marine Corps, claims familiarity with the former judge's record and his failure to promote to colonel; *see* Affidavit of Michael E. Rich at 2-3). This factual dispute need not detain us.[11] Just considering the former judge's affidavit alone, we cannot conclude that his fitness reports or his non-selection for colonel was affected in any way by his appellate decisions. There are many other possible explanations for these career set-backs, and we decline to

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[11]In addition to the affidavits noted above, the Government moved to attach copies of the former judge's fitness reports and his petition to the Board for the Correction of Naval Records with appropriate endorsements. This motion was denied by a majority of the Court, who believed that privacy considerations should preclude their inclusion unless they were necessary to a resolution of a disputed question of fact. The majority believed that these documents showed only the mediocre nature of the former judge's reports, a fact already established by the affidavits, and did not shed any light on the central issue, i.e., whether his poor ratings were the result of his judicial decisions.

engage in the speculation urged by the appellant.[12]

Although he concedes that it is not direct evidence of the JAG's abuse of the fitness report process, the appellant points to the JAG's "record" in recent years in certifying issues to the Court of Military Appeals for review under Article 67(b)(2), UCMJ, as evidence of his prosecutorial orientation, i.e., as proof that he has not exercised his discretionary functions in an impartial manner. That record reveals that virtually all the issues certified under Article 67(b)(2) arose from cases in which the appellants had been granted some relief by this Court. Even if we were to view this evidence as persuasive proof of the JAG's prosecutorial bent in the certification process, we would still decline to make the quantum leap required to reach the conclusion that he is necessarily compromised thereby in his duty to fairly evaluate the performance of duty and conduct of this Court's appellate judges. However, we need not discuss the absence of a compelling nexus between the two because we do not even accept the premise. The JAG is entitled to present issues of law he deems significant to the Court of Military Appeals. The fact that nearly all the issues presented arose in cases in which the accused was granted relief tells us nothing about his reasons for certifying the particular issues involved, nor, in particular, whether he was necessarily assuming the

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[12]It is apparent that the former judge believes he was punished, especially for his participation in the contentious case of *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988), and in this Court's decision to seek the protection of the Court of Military Appeals against an investigation by the Department of Defense Inspector General into allegations of judicial misconduct related to the *Billig* case. *See Carlucci*. Regardless whether his belief is well-founded, the mere fact that he holds that belief raises concerns about the adequacy of the existing fitness report preparation process to assure judges and other interested parties that there is indeed a sound and lawful basis for evaluation, one that is not related to judicial decisions. *See* nn. 13 and 14 in this regard.

role of a Government advocate in so doing. We take note of the fact that the vast majority of this Court's decisions which grant relief to the appellants are not certified. Without more than raw statistics, we are not inclined to conclude that the JAG has abused the certification process under Article 67(b)(2). *See United States v. Caprio*, 12 M.J. 30, 31 n.1 (C.M.A. 1981).

In the absence of persuasive contrary evidence, we find no valid reason to reject the presumption that the JAG will faithfully carry out his duty to preserve the independence of the judiciary and, in particular, to ensure that fitness reports are not used to subvert that independence. In fact, what little meaningful evidence does exist in this case supports the presumption. In an affidavit referred to above, a former AJAG stated that judicial decisions were *not* considered in his preparation of fitness reports for the JAG's signature. Affidavit of Charles H. Mitchell at 8.[13]

On the other side of the fitness report equation are the appellate military judges themselves. Any attempt to subvert independence through the power of the fitness report could only be successful if they were readily susceptible to such influence. Judges, too, are well aware

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[13]We have not addressed the permissible scope of evaluation available to the JAG concerning the performance of appellate judges if he cannot base evaluations on their decisions regarding the merits of an appeal. We believe that the fitness report directives in the Navy and Marine Corps provide sufficient flexibility to accurately hold a judge accountable for his performance and behavior without undermining his independence in his decision-making capacity. For example, judicial demeanor, temperament, industry, collegiality, appearance, military bearing, and adherence to established rules of procedure and ethics, to name a few, are fair areas for evaluation. In the end, this matter is the prerogative of our reporting senior. It is not our place to establish fitness report criteria by judicial fiat as long as the criteria used do not impinge upon a judge's decisional independence.

of proscriptions on the use of the fitness report and presumably can find in those proscriptions some assurances that permit them to exercise their discretion unfettered by fear of retribution. Moreover, each appellate judge has a duty himself to resist any intrusion into his decisional independence. ABA Code of Judicial Conduct, Canon 1; *Carlucci*, 26 M.J. at 336. Assuming the JAG were inclined to intrude, we would expect every judge to do his duty and not allow his independence to be compromised. *See Mabe*, 33 M.J. at 207 (Cox, J. dissenting in part and concurring in the result).

Finally, we note that any judge may pursue several means of redress should he receive a fitness report which appears to him to be unlawfully based on decisions favoring appellants. NAVMILPERSCOMINST 1611.1A; Article 138, UCMJ; 10 U.S.C. § 1552 (Correction of Records); Navy Regulations, 1990, art. 1106. At the same time, we recognize the severe limitations of these means of redress. Retribution by fitness report need not be blatant to be effective. In today's professional atmosphere of intense competition for promotion and retention in the Navy and Marine Corps, even the most subtle shading of grades or narrative comment in a report can signal the end of an officer's march up the ladder of success. Yet, these subtleties may not provide a sufficient basis for relief through the methods listed above, but, if misapplied, constitute as much a threat to judicial independence as the more blatant variety.

For this reason, we place little reliance on these means of redress as a safety net against the improper use of a fitness report. We rely instead on our conclusion that the JAG's best interest lies in preserving, not undermining, judicial independence and on the presumptions that the

JAG will recognize and faithfully execute his duty to preserve our independence and that the judges of this Court will have the integrity and moral courage to steadfastly resist any attempt at undermining that independence.

We recognize that the provisions that preserve judicial independence in the military justice system are not foolproof. No such provisions could be. Inherent in any system of justice that includes measures to hold a judge accountable for his professional conduct is the *possibility* that those measures may be misused to subvert the judge's independence. The military justice system is no exception. However, our analysis of those measures convinces us that this possibility is minimal. We find that there are adequate assurances that the JAG's preparation of fitness reports for military appellate judges does not subvert judicial independence and, in particular, that this appellant has not been denied his right to have his appeal heard by an independent judicial body.

APPEARANCE OF IMPROPRIETY

Finally, we must address the allegation that, aside from any actual effect on the independence of the Court, the JAG's preparation of our fitness reports creates an appearance of unfairness, i.e., that a reasonable observer would conclude that our independence is compromised by this process. Judges must be extremely sensitive to the appearance, as well as the fact, of impartiality. ABA Code of Judicial Conduct, Canon 2; *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988). The remedy in cases where a judge is faced with facts giving rise to an appearance of bias is to disqualify himself. *Sherrod*; R.C.M. 902(a).

Even if we were to find an appearance of bias based

upon the latent threat of an adverse fitness report, we would still find this remedy and the case law that addresses judicial disqualification inapplicable to this issue. While the appearance of bias requiring disqualification can arise in a systemic or non-case-specific manner, *see Tumey v. Ohio*, 273 U.S. 510 (1926), if that appearance is based on the abstract threat posed by an inherent feature of the system of justice, as it is in this case, without a showing of specific harm, it does not mandate disqualification. *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990). Moreover, *per se* disqualification of all appellate judges on this basis would violate the "maxim of the law to the effect that when all are disqualified, none are disqualified." *Allen*, 31 M.J. at 601.

Although such an appearance would not be dispositive of this issue, nevertheless our obligation under the Canons of Judicial Conduct--to preserve public confidence in military justice--requires that we determine whether it exists and, if it does, to take steps to dispel it. In determining whether such an appearance exists, judges must look, objectively, to what a reasonable observer with full knowledge of the facts giving rise to the question would conclude. *United States v. Berman*, 28 M.J. 615 (A.F.C. M.R. 1989).

The facts giving rise to this question are the relationship between the JAG and the Court, the JAG's statutory role as the steward of military justice, the provisions that safeguard the independence of the judiciary, and the directives that address the preparation of fitness reports in the Navy and Marine Corps. We assume as well that this informed reasonable observer would be aware of the nature of fitness reports, their importance in the Navy and Marine Corps, and the manner in which they are actually prepared

for the JAG's signature. Finally, it is nearly as important to note what would not be included in his factual database as it is to consider what is before him. He would have no *convincing* evidence that the JAG has in fact attempted to punish a judge for his decisions or that any judge has been affected by the mere threat of such punishment.

These particulars have been thoroughly discussed above and we find therefrom that a reasonable observer would conclude, as we did, that the JAG's interest lies in preserving, not undermining, the Court's independence, and that any threat arising from the potential for misuse is more abstract than real. To conclude otherwise, that reasonable observer would have to engage in the presumption that the JAG would knowingly violate the law proscribing interference with judicial independence, a presumption no reasonable person would make. In addition, if he were to learn of adverse comments in a judge's fitness report, he would have to speculate that they were the result of the JAG's disapproval of the judge's decisions rather than an assessment based upon lawful grounds. A determination of whether there is an appearance of impropriety should not be based upon speculation and insupportable presumptions. In the end, we find at least a partial answer to the "appearance" question in the fact that the elected representatives of the American public created this system whereby accountable military officers sit as independent judges. If the balance they struck appears fair to them, surely objective onlookers have little cause to complain.

Our inquiry into the appearance aspect of this assigned error does not stop with an assessment of the JAG's role in the fitness report process. Arguably, the method by which the JAG uses his staff to prepare fitness

reports for his signature is solely within his discretion. Yet, if evidence suggests that fitness reports are actually prepared for the JAG's signature by an officer whose interests may be contrary to decisions that favor the appellant, we must look behind the veil to see if that process offends the appellant's right to an independent court. *See United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (court must examine process by which convening authority detailed members to court-martial to ensure compliance with Article 25, UCMJ).

As disclosed above, fitness reports for appellate judges are prepared in the office of the AJAG. Within the Office of the JAG, this officer "stands in the shoes" of the JAG for military justice matters and, therefore, is duty-bound to ensure that military justice is administered fairly and independently. Presumably, he shares the same interest as the JAG in preserving the Court's independence.

At the same time, the AJAG is responsible, through the Director, Criminal Law Division, for implementing this Court's decisions in the field. Some of those decisions may disapprove service-wide policy previously approved by the AJAG and some could lead to significant change in the way that the military justice system operates in the Navy and Marine Corps. *See, e.g., United v. Holloway*, 36 M.J. 1078 (N.M.C.M.R. 1993) (holding that the Navy's military magistrate program does not comply with *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 [1991]). In addition, we attach meaning to the fact that, organizationally, the appellate judges fall directly under the JAG and, unlike those assigned military justice duties in the Office of the JAG, judges are not subject to the control of the AJAG. OJAG Organization Manual § 107. For these reasons, although we find nothing *actually* inimical to our

independence in this arrangement, arguably a reasonable observer may conclude that it is inappropriate for an officer whose duties do not include supervising the Court's judges, but whose professional responsibilities are so *directly* and *closely* affected by the Court's decisions, to participate in the evaluation of the appellate judges.[14]

For the reasons stated, we find that the appellant has not been denied his right to have his case reviewed by an independent appellate court. We have examined the record of trial and the pleadings and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

DAVID C. LARSON

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[14]This opinion is not the place to develop administrative measures to cure an appearance problem arising from the fitness report preparation process. Suffice it to say that we acknowledge that such an appearance may exist, and we urge the Judge Advocate General to examine the process with a view to ensuring that those who participate in it occupy positions less directly affected by the decisions of this Court. In addition, we share Judge Reed's belief, in his concurring opinion, that defining specific criteria for the evaluation of military judges would remove some of the mystery and uncertainty about the process and would lessen the possibility that a judge will leave this Court believing that he has paid a high professional price for his judicial decisions.

We also invite the JAG's attention to two other aspects of the process that may contribute to an unhealthy appearance: 1) The AJAG is included with the Court's Marine judges for comparison rankings, yet he is the officer who submits recommendations for their reports, and 2) the reviewing officer for Marine judge fitness reports is the Assistant Commandant of the Marine Corps. In our opinion, the latter feature is not consistent with the concept of judicial independence and the inherent conflict in the first aspect tends to detract from the integrity of the fitness report process as a whole.

Senior Judges WELCH and JONES concur.

EDWIN W. WELCH

R.A. JONES

Senior Judge STRICKLAND, concurring:

I concur in the majority opinion and write separately only to set the record straight with respect to the allegations contained in former Senior Judge Mitchell's affidavit that I may have previously formed a conviction that would cause my disqualification in this case. Having never seen Lieutenant Colonel Rubens' fitness reports as a judge on this Court until they were sought to be attached to the record by the Government, I can confidently state that I neither had nor expressed an abiding conviction that Lieutenant Colonel Rubens had been "screwed" by these reports. What I may well have expressed to former Senior Judge Mitchell was my belief that Lieutenant Colonel Rubens, himself, perceived that he had somehow been harmed as a result of his service as a judge on this Court. Since I have no preconceived convictions concerning any aspect of this case, I conclude that there are no grounds for recusing myself from participation.

R.A. STRICKLAND

Senior Judge FREYER, concurring:

In light of the comments contained in the Government motion to attach the affidavit of former Senior Judge Charles H. Mitchell, I choose to introduce this opinion with some remarks which I deem necessary to set the record straight.

I have no recollection of having ever been aware of the nature or contents of any fitness reports received by former Judge Rubens for his service as a judge of this Court until I read about them in his affidavit and the Board

for Correction of Naval Records application filed with this Court in connection with the instant case. I was, of course, aware of his orders to Panama, his non-selection for colonel, and *his* abiding conviction that both were due to his involvement in the *Billig-Carlucci* litigation. I had also been told by different people, however, that at least his non-selection for colonel was explainable by other factors relating to his performance in previous assignments. I recall discussing this matter, including *former Judge Rubens'* abiding conviction that his orders and non-selection were in retaliation for his judicial decisions, with former Senior Judge Mitchell on several occasions. I neither had nor expressed any abiding conviction of my own as to the reasons for former Judge Rubens' orders or non-selection, and I have no such abiding conviction now. I do recall expressing some sympathy with the awkwardness of his position, in that the senior trial counsel in the *Billig* case, who, rightly or wrongly, was severely criticized in the majority opinion in *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988), in which Judge Rubens concurred, had become the Head, Judge Advocate Division, Headquarters, U.S. Marine Corps. (This is not to imply that the individual concerned, for whom I have high personal regard, and who has been most helpful to this Court in maintaining our proper manning, acted in any way to Judge Rubens' detriment; I refer simply to the generic awkwardness inherent in such a situation.) In consonance with having an open mind on the issues now before this Court, I certainly considered, and expressed to Senior Judge Mitchell, the *possibility* that official displeasure with the *Billig-Carlucci* litigation might have been, at least to some degree, a contributing factor in former Judge Rubens' overall fate, and I am open to considering that possibility now with respect to his fitness reports as well as the orders and non-selection, if the appellant presents evidence to

warrant that conclusion.

-- I also recall discussing the matter of former Judge Rubens' orders and non-selection on several occasions with Senior Judge Strickland, including former Judge Rubens' abiding conviction that his orders and non-selection were in retaliation for his judicial decisions. I have no recollection of Senior Judge Strickland's ever mentioning former Judge Rubens' fitness reports as a judge of this Court. At no time did Senior Judge Strickland express or otherwise evince to me, or to anyone else in my presence, a conviction, abiding or otherwise, that Judge Rubens' fate was due to his involvement in the *Billig-Carlucci* litigation, and our discussions left me with the general impression that he did not believe that.

-- I also recall discussions among myself, former Senior Judge Mitchell, and other judges of this Court concerning the fates of the O-6 judges who participated in the *Billig-Carlucci* litigation and were considered and selected by Selective Early Retirement Boards. These discussions were inconclusive as to what, if any, part their involvement in that litigation may have played in their selection for early retirement. I neither had nor expressed any abiding conviction concerning the reasons for their selection, and I have no such conviction now. I did, and do, deplore the appearance that arose from the selection of former judges of this Court who participated in the *Billig* decision for early retirement, even though I have been told by people who knew them that their selection was explainable on other grounds, and even though I personally disapproved of portions of the *Billig* opinion (as distinguished from the decision, itself, concerning which I have insufficient knowledge on which to base an opinion).

-- In light of the foregoing, and after considering the authority cited by appellate Government counsel, I perceive no grounds for recusing myself from participation in this case.

Having said that, I concur generally in the majority opinion because I believe that it not only correctly states the law as it is but also follows the approach used by the U.S. Court of Military Appeals in *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991) (*Mabe [C]*) and *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). I also concur in the separate opinions of Judges Reed and Mollison, because they add thoughtful dimensions to the problem, and I share their thoughts, except that I view the Assistant Judge Advocate General for Military Law (AJAG) as the *alter ego* of the Judge Advocate General (JAG) and, therefore, no more or less qualified to be involved in judicial fitness ratings than the JAG, himself. It should be noted that the terms JAG and AJAG may be used to refer to both positions and the individuals occupying those positions at any particular time. I interpret the majority opinion to be using these terms to refer to the positions, themselves. If an incumbent of either position adopts an *unduly* partisan, pro-Government stance, the presumptions on which the majority opinion entirely depends vanish, along with its conclusions, as long as that incumbent is involved in the rating process.

I view this case and *Mabe [C]* as closely related, at least on a theoretical level. In a sense, the underlying assumption of all the opinions in this case is that it would be improper for a reporting senior of appellate judges to base their fitness ratings on the reporting senior's like or dislike for, or agreement or disagreement with, their decisions and rulings. Since, as in *Mabe*, there is nothing

in any statute or regulation which expressly so provides, I conclude that this underlying assumption derives from whatever the U.S. Court of Military Appeals read between the lines of Articles 26 and 37 in *Mabe [C]* and propagated in *Graf* with respect to tenure.

The *Mabe/Graf* "solution" necessarily assumes that the JAG, his designee, and the AJAG are sufficiently disinterested, or at least possess sufficient integrity and equanimity, to give fair ratings without regard to their personal preferences or reactions to findings, sentences, and rulings, if told by the U.S. Court of Military Appeals that they must do so. My primary objective in writing the concurring opinion in *United States v. Mabe*, 30 M.J. 1254 (N.M.C.M.R. 1990) (*Mabe [N]*), was to stimulate discussion about the effects on judicial independence of a system in which trial judges are rated by the JAG's or their designees in light of the JAG's' varied responsibilities, some of which I characterized at that time as being "akin to those of attorneys-general and [involving] complex and subtle relationships to the line components of their services." 30 M.J. at 1274.[1]

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[1]Perhaps the correct analysis of this issue in a system such as ours requires that appearances of conflict be judged by a different standard when they arise from a practice or relationship which the Congress, themselves, have created, expressly or at least by implication. The U.S. Court of Military Appeals have recognized that staff judge advocates and convening authorities act in a prosecutorial capacity before trial and in a judicial (reviewing) capacity in the same case after trial, *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). I cannot imagine that civilian due process would tolerate the civilian analogue of such a practice, and there is no way that an appearance of conflict can be dispelled, as the legislative history of the U.C.M.J. demonstrates; yet, notwithstanding the appearance of conflict, the practice is sanctioned as compatible with *military* due process because the Congress have specifically legislated it, and situations of demonstrated actual bias on the part of staff judge advocates and convening authorities are dealt with on a case-by-case basis. My concurrence in the APPEARANCE OF IMPROPRIETY section of the majority opinion

What I had, therefore, hoped for from the *Mabe [C]* opinion was that it would thoughtfully analyze the concept of rating trial judges by the JAG's or their designees, discuss the propriety of assigning grades in "judgment," "analytical ability," and "organizational support," or at least define how such grades might properly be assigned, and either mend the system within the limits of U.S. Court of Military Appeals authority or call for appropriate legislation (hence, the reference to "the complacency that would result from a less than comprehensive restructuring" near the end of the *Mabe [N]* concurrence, 30 M.J. at 1276). Because the opinion that emerged in *Mabe [C]* was very different, those issues remained unresolved and have now erupted at the appellate level.

The U.S. Court of Military Appeals' approach to those issues was clarified to some degree in *Graf.* As I understand the opinion in *Graf*, it holds:

(1) that the Uniform Code of Military Justice (U.C.M.J.) does not provide for tenure for military judges;

(2) that the Due Process clause of Amendment V to the United States Constitution does not require that military trial or appellate judges be granted tenure;

(3) that, absent such a constitutional requirement, the U.S. Court of Military Appeals lacks the power to override the Uniform Code of Military Justice so as to provide for tenure by judicial fiat; and

(4) that whatever it was that *Mabe [C]* found

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is based on this analysis, which I do not particularly like but believe is probably the law.

between the lines of Articles 26 and 37, U.C.M.J., to render impermissible the rating of military trial judges on their findings and sentences likewise precluded the decertification or transfer of military trial or appellate judges on the basis of the JAG's' opinions of their findings, sentences, or rulings.

If the U.S. Court of Military Appeals apply the *Mabe/Graf* approach to this case, as I expect, they will merely hold that reporting seniors of appellate military judges are prohibited from basing the latters' fitness reports on the formers' like or dislike for, or agreement or disagreement with, the judges' opinions and rulings. Judges who believe that such limitation has been transgressed will be referred to the Board for Correction of Military/Naval Records and Article 138 or, perhaps, be invited to file a petition for extraordinary relief in the U.S. Court of Military Appeals.

The *Mabe/Graf* approach, which I take to define the law we must follow, leads inexorably to affirmance in this case, and I consider the majority and other opinions addressing the issues in this case, taken together, to comprise an appropriate vehicle for arriving at that result. Accordingly, I concur in them all, subject to the qualifications noted *supra*.

My concern with this disposition, however, as with the dispositions in *Mabe [C]* and *Graf*, is that it is almost wholly lacking in any practical mechanism for preventing, detecting, or remedying violations. Unless a reporting senior is clumsy enough to insert objectively prohibited comments in the narrative section of a fitness report, the report can be made virtually inscrutable. The Board for Correction of Military/Naval Records and Article 138 are

useless in such cases, as acknowledged in other opinions in this case and as explained in former Judge Rubens' affidavit (aside from the merit or lack of merit of his own application for relief). As I pointed out in the *Mabe [N]* concurrence:

> Moreover, whereas, in the past, nearly all circuit judges had already attained the grade of O-6, many now are, or shortly will be, O-5's competitive for O-6 in a highly selective environment, who understand perfectly that, with respect to their own fitness reports, the least adjustment in the rankings or slightest nuance in a narrative could make the difference between selection and passover.

30 M.J. at 1275. As it turns out, that may have been an understatement, for I was once informed by a member of a selection board which considered an officer on whom I had written fitness reports that those reports, which I had intended to be superlative, were deemed less so because key phrases in the superlative comments I had written were not underlined. The truth is that the Board for Correction of Military/Naval Records and Article 138 simply are not calibrated to respond to nuances and codes which are instantly recognizable by selection boards, and anyone seriously concerned with judicial independence needs to understand this.

As mentioned previously, once opinions and rulings are placed off-limits, it is unclear on what the letter marks in "judgment," "analytical ability," and "organizational support" are supposed to be based. This problem is closely related to the serious problem of the lack of objective rating criteria identified in other opinions in this case, and

both problems share the inscrutability feature of the fitness report issue previously addressed.

In fairness, it must be acknowledged that, as held in Graf, where the Congress have established a procedure, courts are limited in invalidating that procedure to infirmities of constitutional dimension. Moreover, the *Mabe/Graf* approach parallels the measure adopted by the Congress, themselves, in Article 37 with respect to members, that is, merely placing certain areas off-limits to reporting seniors, while leaving the members at the mercy of the same reporting seniors in other areas. A search of the legislative history of that addition to Article 37 in the Military Justice Act of 1968 has failed to disclose any discussion regarding its probable efficacy.

The old (and quaintly gender-specific) fitness report form, NAVPERS 1611/1 (Rev. 12-69), contained a marking category called "moral courage," which it defined as "To do what he ought to do regardless of consequences to himself." When all is said and done, that is what was required of a military trial or appellate judge before *Mabe* and *Graf*, and it is equally required now. As desirable as moral courage may be, however, the presupposition that there should be adverse consequences to oneself for doing what one ought to do suggests that something is wrong. The administrative framework in which the military judiciaries operate should promote judicial independence affirmatively, not by taxing the moral courage of the judges to compensate for adverse structural conditions, which, by their very existence, create a perception of judicial self-interest in the outcome of decisions among the judges themselves, accused, and members of the public.

If, in this case, the *Mabe/Graf* approach was

adopted with resignation as the best that could be achieved judicially under the present statutory scheme, that would be one thing; but, if it was put forward as a solution, that would be quite another, for it would then pose a grave risk of generating the very "complacency that would result from a less than comprehensive restructuring" warned of in the *Mabe [N]* concurrence, which could delay meaningful reform for years.

J.A. FREYER

Judge MOLLISON, with whom Senior Judge ORR and Judge LAWRENCE join, concurring in part and concurring in the result:

I concur in the Chief Judge's analysis of the due process aspect of the principal issue, but I concur in Judge Reed's analysis of the command influence aspect. This case fortuitously is the vehicle for airing an important issue respecting the relationship between the Judge Advocate General and the officers appointed by him to this Court. The principal assignment of error concerns the delicate balance to be struck between congressionally authorized JAG supervision of the Court and congressionally mandated independence of the Court. I strike the balance as follows: Unless the rating and ranking of appellate military judges is accomplished by the Judge Advocate General based on clearly stated criteria applicable to their unique, independent function in the military (and only with the assistance of persons having no arguable interest, official or otherwise, in the outcome of cases before the Court), military appellate review will not enjoy the confidence in its integrity and independence that Congress and the public require. Means currently exist to redress palpable, individual instances of command influence, and those means

promote confidence in the integrity of the appellate process. The current rating/ranking system breeds claims of subtle, systemic command influence no less worthy of concern. One can only speculate what politically charged cases may come before military appellate tribunals in the future and how their integrity and independence will be tested. But now is the time to remove the lingering doubts the current rating/ranking system fosters.

R.M. MOLLISON

JAMES E. ORR

T. A. LAWRENCE

Judge REED, concurring in the result:

I concur with the result of the majority opinion affirming the findings and sentence, as approved on review below. Additionally, I do not believe that any due process rights of this appellant have been violated. However, I write separately to express my own views on the issue raised by appellant concerning the fitness reports written on the judges of this Court. I believe appellant has raised an allegation that this Court is subjected to a form of command influence and that this allegation should be addressed. I discuss the Judge Advocate General's (JAG) supervisory role over this Court and conclude that such a role is permissible but limited. I also conclude that the Assistant Judge Advocate General (Military Justice) (AJAG) as the JAG's designee may have a role in this Court's supervision, but because of the appearance of a

conflict of interests inherent in the AJAG's roles and missions and the way the Office of the AJAG operates, the role must be filled by the JAG himself. Finally, while unlawful command influence might, in some cases, be perceived, it does not appear in appellant's case, and I determine he has suffered no prejudice.

I

BACKGROUND

To provide background for a discussion of the issue, I would make the following findings of fact, in addition to those contained in the majority opinion:

The AJAG has primary supervisory responsibility for the performance of the Judge Advocate General's statutory duties in all military justice and related matters as authorized in the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 801-940), the Manual for Courts-Martial, 1984 (MCM, 1984) and the Manual of the Judge Advocate General (JAG Manual). He also serves as the Officer in Charge (OIC), Navy-Marine Corps Appellate Review Activity (NAMARA).[1] Falling under him in his role as the OIC are the Appellate Defense Division and the Appellate Government Division.[2] As the OIC, NAMARA, the AJAG writes the fitness report for the Appellate Defense Division Director, a Navy Commander, O-5, and for the Appellate Government Division Director, a Marine

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[1]Judge Advocate General Instruction (JAGINST) 5400.1A of 6 July 1992, § 107.

[2]*Id.*

Corps Colonel, O-6.[3]

I judicially note the following: The AJAG is attached to the Office of the Judge Advocate General of the Navy. The Navy and Marine Corps Appellate Judges are attached to NAMARA.

The office of the Judge Advocate General of the Navy is in the executive part of the Department of the Navy. 10 U.S.C. § 5148(b). The Judge Advocate General of the Navy performs his duties under the direction of the Secretary of the Navy. 10 U.S.C. § 5148(d).

The Judge Advocate General of the Navy is assigned to the staff of the Chief of Naval Operations (CNO) as Special Assistant for Legal Services, and is tasked to advise and assist the CNO in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy. JAGINST 5400.1A, § 102.b. Additionally, the JAG exercises, for CNO, centralized coordination of the provision of legal services by the Naval Legal Service Command and other judge advocates; effects liaison with the Commandant of the Marine Corps concerning legal service matters of mutual interest to the Navy and Marine Corps; and maintains liaison, for the CNO, with other DOD components, other government agencies, and agencies outside the Government on legal service matters affecting the Navy. JAGINST 5400.1A, § 102.b.

I believe few are aware of how all-encompassing the JAG's role is, not only in military justice matters, but

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[3]Information provided to this Court, *en banc*, during oral argument, 23 March 1993.

in personnel actions which affect both trial and appellate judges; the personnel actions are invariably driven by fitness reports. A general knowledge of such involvement is important in discussing the issue of possible command influence through the use of such reports.

A Judge Advocate General has sat on a Commander to Captain promotion board;[4] has sat on boards convened to select Navy JAG Corps officers for involuntary early retirement;[5] has sat on boards convened to recommend to the Secretary of the Navy the appointment of a Marine Corps officer to serve as the Director, Judge Advocate Division, a general officer (O-7) billet and the senior lawyer in the U.S. Marine Corps;[6] has sat on a promotion board to recommend to the Secretary of the Navy that a Marine Corps judge advocate be assigned as the Assistant Judge Advocate General of the Navy (Military Justice) and be eligible to retire as a general officer, with the rank, grade, and pay of such pursuant to 10 U.S.C. § 5149(c);[7] has detailed Navy judge advocates to sit as the Assistant

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[4]At least one of this Court's former judges, an officer in the grade of 0-5, failed selection to the grade of 0-6 subsequent to his assignment to this Court. Furthermore, in the past, one sitting judge of this court failed to select for 0-6.

[5]In the past, at least one of this Court's sitting judges has been selected for involuntary early retirement, although not on a board in which the JAG participated.

[6]See 10 U.S.C.A. § 5046 (West Supp. 1992). At least one of the former judges of this Court has gone on to serve as the Director, Judge Advocate Division, serving as a brigadier general and retiring as such.

[7]At least two of this court's former judges were subsequently assigned as the AJAG (Military Justice) and were retired in the grade of brigadier general.

Judge Advocate General eligible to retire as a flag officer pursuant to 10 U.S.C. § 5149(c); and details judge advocates to this Court, upon recommendation of a screening board,[8] and upon termination of such assignments, approves the reassignment of Navy judges to other billets within the Judge Advocate General's Corps, unless such judge retires.

II

POSTURE OF THE CASE

"The Uniform Code of Military Justice confers upon the Judge Advocate General [and the AJAG, his designee,] independent judicial or quasi-judicial responsibilities which are so substantially separated from the mainstream of prosecution that it is at least arguable that his office stands separate and apart from either party to the case." *United States v. Monett*, 16 C.M.A. 179, 180 n.1, 36 C.M.R. 335, 336 n.1. If such is true, and I believe it to be, the JAG or the AJAG must accord each party to a military justice proceeding the same respect and the same even-handed treatment that the other receives, regardless of the issue presented. If the AJAG, as the JAG's designee and the supervisor of both the Appellate Government and Appellate Defense Divisions, treats or appears to treat the parties differently or apparently accords one side favoritism to the detriment of the other, the overall system of military justice suffers. As a result, and not unexpectedly, one party might well allege prejudice, as has occurred here.

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[8]JAGINST 5817.1 of 18 Nov 1991 Subj: Judicial Screening Board. "The report of the Board is advisory in nature and does not restrict whatsoever the statutory authority of the Judge Advocate General to make judicial appointments." JAGINST 5817.1 ¶ 4g.

I note for the record that appellate defense counsel has been consistently thwarted in her efforts to obtain information or discovery in this case through the efforts of the Appellate Government Division and presumably the personnel assigned to the Office of the AJAG. The Appellate Government Division has claimed attorney work-product privilege for papers forwarded to the JAG requesting that the JAG certify issues to the Court of Military Appeals; appellate defense attorneys, on the other hand, note that their requests for information/certification to the JAG are routinely routed through the Appellate Government Division for comment. Appellate Government Division personnel and personnel attached to the office of the AJAG have generally refused to be interviewed concerning the way that office handles military justice matters, mostly matters of a non-confidential nature; the AJAG has used Appellate Government Division personnel to draft replies to requests from appellate defense counsel; and Appellate Government Division personnel have sought a protective order from this Court to keep Government personnel, including the AJAG and his deputy, from being interviewed.[9] While the lawyers assigned to the Appellate Government Division are expected to be advocates, to maintain the needed appearance of impartiality, the AJAG as the JAG's designee should be above such tactics. As a result of the above, appellant claims a *perceived* bias by

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[9]This Court denied that request and eventually ordered the AJAG to respond to inquiries requested by appellate defense. Had appellate defense pursued the matter and established relevancy and necessity, requests for further interrogatories of the AJAG and the JAG would have been considered by me.

the AJAG in favor of the Government.[10] I must concur. However, such a perception of bias is relevant in the case before us only as it relates to matters reflecting on the independence of this Court and as raised in the assignment of error. I believe it has relevance considering, as I discuss later, the AJAG's role in submitting recommended fitness reports on appellate judges to the JAG.

III

DISCUSSION

Marine Corps Order P1610.7, para. 6006.2 of 19 March 1988, provides that

> [t]he reporting chain for a Marine Corps judge advocate assigned to perform duties as a military [trial] judge will be as defined in applicable military judiciary instructions. Fitness reports shall conform to the general policies described in this Manual and instructions provided by the Judge Advocate General of the Navy, the Chief Judge of the Navy-Marine Corps Trial Judiciary, or the Chief Judge of the U.S. Navy-Marine Corps Court of Military Review.

No such order or instruction exists for appellate military judges, with the result that it is unclear as to what report-

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[10]Defense has been thwarted in any reasonable effort, outside judicial decree, to obtain information. Most of the facts revealed in this case result from disclosure by this Court. Facts were revealed by the AJAG (Military Justice) only after an order of this Court and then with a preface to the Government's perplexity over "this Court's support for this frivolous litigation."

ing chain exists for appellate judges. In the absence of such an instruction, the criteria used for reporting on Marine Corps appellate judges must be the criteria which apply generally to all Marine Corps officers as listed in the Marine Corps fitness report order itself.[11] Certainly, there is doubtful authority, as the majority opinion recognizes, for the Assistant Commandant of the Marine Corps to act as the Reviewing Officer on fitness reports for Marine Corps appellate judges.

The Navy fitness reports are governed by NAVMILPERSCOMINST 1611.1A. Nothing within that

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[11]As military judges it is difficult for us to understand what criteria are used to evaluate us. We are aware of the fitness report orders but have received no explanation of how those criteria are used to report on us as members of the judiciary.

I also observe that little is known outside the Court, itself, of the work of individual judges, and Article 66(g) of the UCMJ prohibits anyone who is in the best position to evaluate those things usually associated with assessing someone else's performance from participating in the process. Those measures of performance noticeable to anyone outside the Court are essentially those few published opinions (and for someone particularly close to military appellate work, unpublished opinions) that are individually subscribed. Those few published opinions for some judges may represent only 2 or 3 percent of the cases he or she is assigned as lead judge and 1 percent or fewer of those cases in which that judge actually participates. For other judges, the percentages may be far less, and the frequency of unpublished opinions that are individually attributed is hardly more than a few percentage points higher than for published opinions.

In the last six bound volumes of the Military Justice Reporter (volumes 30 through 35), encompassing approximately the last 3 years, this Court has published fewer than 200 opinions. Volume 29 contains *no* NMCMR decisions. The workload of this Court during any *one* of those 3 years has been in excess of 3000, if not 4000, cases.

Consequently, the work of an appellate judge on this Court visible to the outside observer is a mere fraction of what that judge actually does. That visible fraction tends to be cases that may be more noteworthy or controversial because of the holding.

instruction specifically addresses fitness reports for either appellate or trial court judges.

PROPRIETY OF THE JUDGE ADVOCATE GENERAL SUBMITTING FITNESS REPORTS ON MILITARY JUDGES

The purpose of the Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335, was in part to

> redesignate appellate boards of review as 'courts of military review' and change somewhat their structure, to increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers, and to increase the post-conviction safeguards and remedies available to the accused.

S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1968), *reprinted* in 1968 U.S.C.C.A.N. 4501, 4503-04.

The legislative history of the 1968 Act indicates, at least as far as the trial judiciary is concerned, an

> intent . . . to provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the Judge Advocate General of the service and are responsible only to him or his designees for direction and fitness ratings.

Id. at 4507-08. However, unlike the language dealing with trial judges, there is neither a codal provision nor any expression in the legislative history of the Military Justice Act of 1968 to indicate congressional intent that appellate judges be assigned to the JAG for their "direction and fitness ratings." "The purpose of the amendment was to provide a single appellate body for the review of court-martial cases within each service, to improve and enhance the stature and independent status of these appellate bodies, and to provide for sound internal administration within these courts of military review." *Id.* at 4515. The legislative history and the testimony before Congress urging the passage of the Military Justice Act of 1968 make clear that the judges of the courts of military review and the military trial judges were to be part of an independent judiciary, responsible only to the Judge Advocate General. Although the UCMJ and the legislative history of the 1968 Act are silent as to either the JAG or the AJAG using fitness reports to report on appellate judges,[12] the legislative

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[12] Section 2(27) amends article 66 (boards of review) by redesignating the boards as "courts of military review" and by directing each judge advocate general to establish a single court of military review in the place of the "one or more boards of review" provided for in the present article 66(a). . . . *The purpose of the amendment is to provide a single appellate body for the review of court-martial cases within each service, to improve and enhance the stature and independent status of these appellate bodies, and to provide for sound internal administration within these courts of military review.*

S. Rep. No. 1601 at 4514-15 (emphasis added). Congressman Philbin in his report to the House of Representatives on the Military Justice Act of 1968 (H.R. 15971) noted

> The bill changes the name of the intermediate appellate agencies in the military from boards of review to courts of military review. The bill requires that the judges of these

history is clear that the Judge Advocate General was to play a prominent role in ensuring the independence of the trial and appellate judiciaries.

Appellate defense counsel argue that it is through this very role of protecting the independence of the judiciary that the JAG exercises control or is perceived as exercising control over the appellate courts.[13] He does this, the argument goes, through the use of fitness reports.

The majority opinion today notes that an analysis of the current case under an "unlawful command influence framework [is] not particularly suitable because no specific evidence that the JAG has attempted to influence the Court has been introduced and the case law that has addressed this matter generally requires such evidence to 'raise the issue'." However, the Court of Military Appeals has not limited such inquiry to cases only where there is "specific evidence."

> If anything is clear in the Uniform Code of Military Justice, it is the congressional resolve that both actual and *perceived* unlawful command influence be eliminated from the military justice system. Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate

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courts and the military judges of courts-martial be part of an independent judiciary, responsible only to the Judge Advocate General.

114 Cong. Rec. 23, 30564 (1968).

[13]This concern needs to be considered in light of the JAG's overall role in assignments, promotions, and other personnel matters.

> General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, the Judge Advocate General and his representatives should not function as a commander's alter ego but instead are obliged to assure that all judicial officers remain insulated from command influence before, during, and after trial.[14]

United States v. Ledbetter, 2 M.J. 37, 42 (C.M.A. 1976) (emphasis and footnote added).

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[14]The Court of Military Appeals noted in Ledbetter that the appearance of judicial tampering could be eliminated by congressional action to provide some form of tenure for all judges in the military justice system. *See United States v. Ledbetter*, 2 M.J. 37, 43 n.12 (C.M.A. 1976).

I note, as did Judge Cox in his separate opinion in *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991):

> Canon 1 of the ABA Code of Judicial Conduct includes this very simple statement, "An independent and honorable judiciary is indispensable to justice in our society." A judge who lives by the Code cannot be unlawfully influenced by outside pressures.[15] A good judge will accept criticism, reflect upon it, and hopefully render the best judgment possible, uninhibited by the dangers which lurk if his judgment does not please the community in which he must function.

Mabe, 33 M.J. at 207 (Cox, J., dissenting in part and

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[15]Military judges at the trial or appellate level have a sworn obligation to perform their judicial duties–this obligation existing both under their oaths as military officers and under their oaths as judges. The first Canon of Judicial Conduct requires that judges uphold the independence and integrity of their courts. ABA Code of Judicial Conduct, Canon 1 (1972). When, in 1968, Congress changed the title "law officer" to "military judge" and "board of review member" to "appellate military judge," *see* Pub. L. No. 90-632, §§ 2(8) and 2(27), 82 Stat. 1336, 1941, it certainly intended that military judges would be subject to this Canon–which is applicable to all other judges throughout the United States. Indeed, for Congress to name someone a "judge" and not intend for him to perform his duties as a "judge" would be to perpetrate a fraud on servicemembers and on the American public. It follows that a military judge–whether at the trial or appellate level–who fails to uphold the independence and integrity of his court is guilty of dereliction of duty and has violated the Uniform Code.

United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 336 (C.M.A. 1988).

concurring in the result)(footnote added). I agree that a good judge will function to the best of his or her ability without any regard to outside influence. However, the discussion following Canon 1 adds: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity *and independence* of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor." (Emphasis added.)[16]

Although addressing a different level of review, the Court of Military Appeals has said: "The accused's entitlement to an impartial post-trial review . . . is a substantial right and the critical first step on the appellate ladder. He is entitled to the completion of this stage without the possibility that it was influenced by the opinion of superior authority." *United States v. Martinez*, 11 C.M.A. 224, 227, 29 C.M.R. 40, 43 (1960).

The Court of Military Appeals has gone to great lengths to ensure not only the impartiality of this Court but also to ensure that there is no appearance of partiality. In *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984), appellant complained that a senior judge of one of this Court's panels used notes from the Government lawyer who argued the case in preparing the Court's opinion. In returning the record of trial for a new review before a different panel, the Court of Military Appeals noted that even if the notes played no part in the panel's decision, "at

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[16]Anecdotal stories exist concerning former judges who believe their careers may have been adversely affected by service on this Court. The affidavit of a former judge submitted by appellant is one such example. The importance of the affidavit is not whether this judge's career was affected by his tour on this Court but his belief that it was.

the very least, such action impairs confidence in the military appellate process. Whether, as here, in a capital case or in any other case, an appellant is entitled to every assurance that no *hidden or unknown* influence will play a part in the outcome of his appeal." *Rojas*, 17 M.J. at 155 (emphasis added).

Having said this, the Court of Military Appeals has not prohibited the use of fitness reports. In *Mabe*, the Court recognized that fitness reports could be written on trial judges by the Chief Trial Judge and by the Judge Advocate General of the Navy but limited the areas that legitimately could be commented upon:

> We state again today that the fitness-report system cannot be used as a conduit for command complaints against judge-alone sentencing. We also conclude that the majority of the court below committed no legal error in finding for this reason that the Garvin Memorandum [directed at a circuit judge supervised by Judge Garvin and which noted that the recipient judge's circuit was a circuit of preference in sentencing for servicemembers accused of being unauthorized absentees] constituted command influence.

33 M.J. at 206.

While prohibiting such comments in a fitness report written on a circuit judge, nevertheless, the Court of Military Appeals allowed the Chief, Navy-Marine Corps Trial Judiciary, to provide comments to the JAG, which were then used by the JAG in a report on the trial judge

that could, at best, be characterized as average. *See United States v. Mabe*, 30 M.J. 1254, 1261 n.2 (N.M.C.M.R. 1990) (*en banc*). This Court did go on to say in that footnote that the input from the chief trial judge did not address matters of in-court judicial discretion.

It should be noted that

> [t]he enactment of the Uniform Code of Military Justice eliminated the requirement that The Judge Advocate General participate in action by the board of review. With respect to their decisions, his function is now purely administrative, and he must be content to accept their conclusion or to exercise his authority under . . . 10 U.S.C. § 867, to certify the decision to [the Court of Military Appeals].

United States v. Martinez, 11 C.M.A. at 228, 29 C.M.R. at 44. I submit that this line of decisions also limits those matters the JAG can legitimately consider or comment on in submitting fitness reports on military appellate judges.

The majority opinion in this case notes that any judge may pursue several avenues of redress should he receive a fitness report which intrudes on his judicial independence. However, as also pointed out in the majority opinion, these avenues of redress may be of little value in repudiating "subtle shading of grades or narrative comment in a report," or even a mediocre ranking on a

fitness report. Such reports influence promotions, assignments, and involuntary retirements. I concur with the majority's view that *generally* the JAG's best interest lies in preserving judicial independence. At times, however, the JAG's and the military leadership's concerns may be contrary to those of the Court, as in *United States v. Kossman*, ___ M.J. ___, No. 92 2486M (N.M.C.M.R. January 26, 1993) (upholding continued viability of 90-day pretrial confinement rule of *United States v. Burton*); *United States v. Holloway*, 36 M.J. 1078, (N.M.C.M.R. 1993) (*en banc*) (applying *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 [1991] to pretrial confinement in the Naval Service); and *United States v. Watson*, 35 M.J. 602 (N.M.C.M.R. 1992) (*en banc*) (holding post-trial actions invalid where convening authority's responsibilities transferred without following secretarial regulation). In some cases, these concerns are in direct conflict, i.e., *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988) and *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988) (*en banc*).

So what is the role of the JAG vis-a-vis this Court? Although few, the Federal cases dealing with this subject are enlightening. [17] In *Chandler v. Judicial Council*, 398 U.S. 74 (1970), the Chief Judge of the U.S. District Court for the Western District of Oklahoma filed in the U.S. Supreme Court for leave to file a petition for a writ of mandamus or prohibition addressed to the Judicial Council of the Tenth Circuit, which had entered various orders

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[17]The Court of Military Appeals has held that Federal practice applies to court-martial procedures if not incompatible with military law or with the special requirement of the military establishment. *See United States v. Knudson*, 4 C.M.A. 587, 591, 16 C.M.R. 161, 165 (1954).

depriving the petitioner of the assignment of cases filed in the District Court. The Supreme Court denied the motion. The petitioner had sought relief from the Circuit Judicial Council's temporary order finding petitioner had failed to efficiently discharge his duties and directing that the petitioner was to take no action in any case in the district. The order was entered under 28 U.S.C. § 332, which authorizes each judicial council to make necessary orders for effective administration of the business of the courts within its circuit, and was subsequently modified to allow the petitioner to act on cases currently pending before him.

Following the *Chandler* decision, the U.S. Court of Appeals for the Eleventh Circuit stated:

> The *Chandler* Court, to be sure, drew back from attempting to define the permissible extent of a circuit council's administrative powers. Thus it never ruled expressly whether Judge Chandler's colleagues went too far in refusing to assign him further cases until he had coped with his backlog. The Supreme Court also made it plain that court management powers exercised by a judge's colleagues could be unconstitutional if they amounted to an undue burden upon the independence of an individual judge. . . . Nonetheless the Court indicated that for "a complex judicial system [to] function efficiently," judges are entitled to *some* degree of "statutory framework and power whereby they might 'put their own house in order.'"

Matter of Certain Complaints Under Investigation, 783 F.2d 1488, 1505 (11th Cir. 1986)(alteration in

original)(citations omitted).

As for the argument "that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself," *id.*, the Eleventh Circuit rejected that notion and stated:

> The majority in *Chandler* indicated that there was no constitutional obstacle to the broadly worded grant of authority to judicial councils, and that the judges of a court could take reasonable management actions affecting all judges *provided they were not violative of each judge's essential independence in respect to decision-making*. . . .

Id. (emphasis added). The Court continued:

> The key to the disagreement between the *Chandler* dissenters and the majority may well lie in the fact that whereas the dissenters saw the realm of judicial independence to be all-encompassing, the majority located a judge's protected independence, more narrowly, "in deciding cases or in any phase of the decisional function." The Court continued, "It is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business."

Id. at 1506-07. While *Chandler* did not decide how far a judge's colleagues might go in the pursuit of administrative goals, it indicated that Congress has some leeway in this area.

In *Territorial Court of the Virgin Islands v. Richards*, 847 F.2d 108 (3d Cir. 1988), the Territorial Court, an Article I Court, brought action against the Department of the Interior seeking a declaratory judgment and arguing that the authority to audit the Territorial Court resided in the Administration Officer of the United States Courts and not in the Inspector General of the Department of Interior. The Territorial Court, created by the Territorial legislature pursuant to powers granted by an act of Congress, argued that permitting an executive agency to audit a judicial body would violate the constitutional principle that the legislative, executive, and judicial branches are independent and co-equal branches of the government. Citing article IV, § 3, cl. 2, of the U.S. Constitution, the Third Circuit gave short shrift to this argument and, without any reference to the Chandler decision, stated they were "unwilling to find such a constraint on Congress in its relations with the territories of the United States." 847 F.2d at 112.[18]

I would conclude from these decisions as well as those by the Court of Military Appeals that the judges of this Court, a creation of Congress, are no more free from all supervision and intervention than are other Federal judges. The question remains, however, whether, if neither actual bias is shown as in the case before us nor even the "appearance of impropriety," the JAG is precluded from any involvement in the evaluation of appellate judges. I think the clear answer is that he is not. As I read the

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[18]The majority, in its analysis, attempts to draw parallels between the military justice system and the system dealing with administrative law judges. I do not find the analogy helpful. A defendant has much more to lose – his liberty and, in some cases even his life -- than a respondent in an administrative proceeding.

authorities cited above, the role of the Judge Advocate General is to protect the independence of the judicial system. Clearly, federal and military authorities decry any interference in the judicial decision-making process. While interference is impermissible for the JAG, other areas of possible supervision and administration are not. Appellate military judges are military officers; in addition to their judicial duties, they also have military responsibilities which are compatible with those duties. A fitness report may certainly be used to report on these other military responsibilities.[19]

The AJAG, however, should play no role in the evaluation of appellate judges. As noted, the AJAG is *the* person primarily responsible for the performance of JAG's statutory duties in all military justice and related matters under the UCMJ, the MCM, 1984, and the JAG Manual. As such, his time is devoted almost exclusively to military justice matters. Certainly a great deal of his work is driven by opinions of this Court. Decisions like *Holloway, Watson, Kossman*, and others, can only increase the workload of AJAG personnel and potentially contradict positions the AJAG may have taken on exactly the same issue in advice or recommendations to the JAG. Not only is the daily work of the AJAG intertwined with the decisions of this Court, the AJAG is himself compared and graded against those very appellate judges. At least an appearance of a conflict of interests arises when the AJAG is asked to submit draft reports on appellate judges, not only whose opinions directly affect the performance of his

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[19]Such responsibilities might include personal appearance in uniform, physical conditioning, temperament, efficiency, productivity, etc. In this regard it might be helpful to elicit comments from military judges, the Association of American Judges, the American Bar Association, and others.

job but also who are rated against him.

Although the AJAG's duties are constantly intertwined with military justice matters, the JAG's arguably are not.[20] Thus, when the JAG needs input on the performance of appellate judges he logically turns to the person he has designated as responsible for military justice matters, the AJAG. However, because of his own interest in the outcome of the fitness report system and his possible disagreement with opinions from this Court, in submitting recommendations the AJAG is placed in an untenable and possibly compromising position.[21]

The Chief Judge, Navy-Marine Corps Trial Judiciary, and the Chief Judge, U.S. Navy-Marine Corps Court of Military Review, are each ranked alone and compared to no other;[22] such is called a one-of-one report. The stated rationale for doing this is that it would be unfair for other

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[20]An argument posited by some on the validity of the JAG writing reports on appellate judges is his impartiality because of his distance from the military justice scene. Two factors augur against this position of neutrality: (1) information on military justice matters is filtered by the AJAG on the way to the JAG–as explained earlier, the AJAG is not necessarily impartial; and (2) although the JAG arguably spends only a small amount of time on military justice, the military matters he spends time on are the high visibility, high profile cases in which the senior leaders of the Naval Service have an interest.

[21]Some may argue that the only impact that a fitness report has on a judge is whether a judge makes flag or general officer rank. More is at stake than that. Junior judges hope for a coveted follow-on tour; 0-5's hope to make 0-6 (although there are not 0-5's on this Court today there have been in the past and the Army routinely assigns 0-5's to its Court); 0-6's hope to avoid involuntary selective early retirement if they are not ready to retire; Marine 0-6's may seek the AJAG (Military Justice) billet which in the recent past has allowed an 0-6 to retire as an 0-7; etc.

[22]This fact as to the Chief Judge of the trial judiciary was admitted by the Government in its oral argument before this Court.

trial judges or appellate judges to be ranked against their Chief Judge because they would always come out second best. The same can be argued as the reason against comparing the AJAG against the Marine Corps judges of the Court of Military Review.[23]

While it has been said that the Marine Corps regulations currently in effect require the AJAG to be rated against the CMR judges, I do not read the regulations as requiring such a result. *See* MCO P1610.7C of 4 Nov 85 (Marine Corps Performance Evaluation System). When this grouping of judges with the AJAG for reporting purposes is added to the present system of allowing the AJAG to prepare suggested fitness reports on the judges of this Court and considering the AJAG's perceived bias in favor of appellate government counsel as noted above, any argument that the AJAG is impartial is unpersuasive. Removal of the AJAG from the ranking structure of judges and precluding any fitness report recommendations by him would obviate what appears to me to be a clear conflict of interests.

From the above perhaps too lengthy discussion, I conclude that:

> (1) Interference in or comment on the judicial decision-making process or the consideration of the outcome in particular cases by the JAG, or the AJAG as his designee, in a fitness report or in any other manner is impermissible.

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[23]It is judicially noted that the Assistant Judge Advocate General (Civil Law), the counterpart of the AJAG (Military Justice), is rated by the JAG, as one-of-one, and compared against no other for fitness report purposes.

(2) In order for an appellate judge to be properly evaluated by the JAG in a fitness report, specific objective criteria must be developed, specifically excepting judicial decision-making process;[24] such has not been done and, to the extent that criteria currently being used violate this principle, such criteria should no longer be used;

(3) The practice of ranking appellate judges should be discontinued. In the absence of specific objective criteria, "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done"[25] and would perceive an appearance of command influence.

As for this appellant, I conclude that he has not been prejudiced. While an allegation of command influence, including the appearance of command influence, may legitimately be raised in an appropriate case, and may carry the day and mandate reversal, appellant's is not such a case.

I do not believe that any reasonable person could possibly conclude that the JAG, or any other person or party in a position to exert influence on the judges of this Court, would have any particular interest in appellant's case. Pursuant to his pleas, appellant was found guilty. He specifically requested a bad conduct discharge at trial. He has raised no specific error to this Court other than a

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[24]Logic, analytical ability, knowledge, loyalty, et al, should be excluded as criteria.

[25]*United States v. Berman*, 28 M.J. 615, 616-18 (A.F.C.M.R. 1989).

general attack on its judges. He has posited no possible reason that the JAG or the AJAG would have any interest in him. I thus would affirm the findings and sentence as approved on review below.

ALBERT A. REED

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	USCMA Dkt. No. 93-1444/NA
	)	CMR Dkt. No. 92-0537
Appellee	)	
	)	
v.	)	ORDER
	)	
	)	
George A. SEAVER(231-68-6336),	)	
Appellant	)	

On consideration of the granted issue (Daily Journal December 21, 1993) in light of United States v. Mitchell, 39 MJ 131 (CMA 1994), and United States v. Lewis, 39 MJ 280 (sep. op.) (CMA 1994), it is by the Court this 21st day of June 1994

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review dated June 30, 1993, is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (FERDENZI)
Appellate Government Counsel (SCUDDER)

APPENDIX D

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

J.A. FREYER EDWIN W. WELCH R.M. MOLLISON

UNITED STATES

V.

George A. SEAVER, 231-68-6336
Lieutenant Commander (O-4), U.S. Navy

NMCM 92 0537 Decided 30 June 1993

Sentence adjudged 22 July 1991. Military Judge: Mark R. Dawson. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Philippines, FPO San Francisco 96651-0051.

LT JAMES R. CRISFIELD, JR., JAGC, USNR, Appellate Defense Counsel
Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto.

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[1] I. THE UNSUSPENDED SENTENCE TO CONFINEMENT OF EIGHTEEN YEARS, A DISMISSAL, AND TOTAL FORFEITURES, IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

II. THE STAFF JUDGE ADVOCATE'S RECOMMENDATION PROVIDED INACCURATE INFORMATION TO THE CONVENING AUTHORITY.

III. THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO PRESENT, ON THE MERITS, CUMULATIVE AND INFLAMMATORY EVIDENCE REGARDING MATTERS WHICH APPELLANT HAD ALREADY OPENLY TESTIFIED TO IN THE PROVIDENCE INQUIRY. THIS ERROR WAS EXACERBATED BY THE INFLAMMATORY NATURE OF TRIAL COUNSEL'S CLOSING ARGUMENT. (FOOTNOTE OMITTED.)

IV. APPELLANT'S PLEAS OF GUILTY TO THE SPECIFICATIONS UNDER CHARGE I WERE IMPROVIDENT WHERE APPEL-
LANT'S LICKING OF THE VICTIM'S GENITALS DID NOT CONSTITUTE PENETRATION. (FOOTNOTE OMITTED.)

V. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL PRESENTED NO EVIDENCE ON THE MERITS. (FOOTNOTE OMITTED.)

VI. APPELLANT'S COURT-MARTIAL WAS TAINTED BY UNLAWFUL COMMAND INFLUENCE. (FOOTNOTE OMITTED.)

VII. THE COURT-MARTIAL HAD NO JURIS-DICITON BECAUSE THE MILITARY JUDGE'S LACK OF A FIXED TERM OF OFFICE LEFT THE MILITARY JUDGE INSUFFICIENTLY INDEPENDENT TO SATISFY THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE. (CITATION OMITTED.) BECAUSE THE ERROR IS JURISDICTIONAL AND THE RECORD CONTAINS NO EVIDENCE OF A *KNOWING* WAIVR OF APELLANT'S RIGHT TO AN INDEPENDENT MILITARY JUDGE, THE ISSUE IS NOT WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL.

VIII. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE APPELLANT'S MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATIONS OMITTED.)

Concerning the first assignment of error, we do not find the sentence adjudged inappropriately severe. We acknowledge that the appellant has had a record of professional success during his Navy career and that he accepted responsibility for his actions at Court. However, the nature of the crimes committed, the number of victims and their families, the amount of thought obviously given to the crimes by the appelant over the extended period of time when they were committed, and the need to deter such crimes in society fully warrant harsh punishment. Accordingly, the first assigment of error is without merit.

The other assignments of error are also without merit. *United States v. Lowry*, 33 M.J. 1035 (N.M.C.M.R. 1991); *see United States v. Cox*, 18 M.J. 72 (C.M.A. 1984); Record at 20-25; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *United States v. Jones*, 30 M.J. 849, 854 (N.M.C. M.R. 1990); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3787 (U.S. May 24, 1993) (No. 92-1482); *United States v. Graf*, 35 M.J. 450

BECAUSE THIS ERROR IS JURISDICTIONAL, THE ISSUE IS NOT WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL.

(C.M.A. 1992) (en banc). Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.

CONCURS/ABSENT FOR SIGNATURE
J.A. FREYER, Senior Judge

EDWIN W. WELCH, Judge

R.M. MOLLISON, Judge

APPENDIX E

Relevant portions of the Uniform Code of Military Justice [UCMJ]

UCMJ Article 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a

member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

APPENDIX F

Relevant Portions of Rule for Courts-Martial 902, Manual for Courts-Martial 1984

Rule 902. Disqualification of military judge

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

APPENDIX G

An officer in paygrade O-5, with 20 years of service has a monthly income of $5502.26 ($4579.50 base pay + $780.30 basic allowance for quarters [BAQ] + $142.46 basic allowance for subsistence [BAS]). This works out to an annual income of $66,027.12.

An officer in paygrade O-6, with 20 years of service has a monthly income of $6014.36 ($5062.20 + $809.70 + $142.46) and an annual income of $72,172.32.

The lost income from a failure of selection is $6,145.20.

******

An officer in paygrade O-5 who retires at 22 years receives 55 percent of his base pay or $31,280.04 annually ((55% x $4739.40) x 12).

An officer in paygrade O-6 who retires at 22 years receives 55 percent of his base pay or $35,346.96 annually ((55% x $5355.60) x 12).

The annual difference in salary is $4,066.92. Over a 20 year period this would amount to a loss of $81,338.40 to the officer in paygrade O-5 who failed to promote to O-6.

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An officer in paygrade O-6 who is involuntarily retired at 22 years would receive 55 percent of his base pay or $35,346.96 annually (see previous section).

An officer in paygrade O-6 who retires voluntarily at 26 years would receive 65 percent of his base pay or $45,307.08 annually ((65% x $5808.60) x 12). He would also have received 4 additional years of full salary totalling $312,557.28.

Yrs	Base Pay + BAQ + BAS	Annual Salary
23	($5355.60 +$809.70 + $142.46) x 12 =	$ 75,693.12
24	($5536.80 +$809.70 + $142.46) x 12 =	$ 77,867.52
25	($5536.80 +$809.70 + $142.46) x 12 =	$ 77,867.52
26	($5808.60 +$809.70 + $142.46) x 12 =	$ 81,129.12
	TOTAL	$312,557.28

******

An officer who is involuntarily retired at paygrade O-5 with 20 years of service would receive 50 percent of his base pay or $27,477.00 annually ((50% x $4579.50) x 12).

An officer who voluntarily retires at paygrade O-6 with 26 years of service would receive 65 percent of his base pay or $45,307.08 annually (See previous section). In addition, he would have received paygrade and longevity increases as part of a full salary for an additional 6 years totalling $454,277.52 (assuming selection to O-6 at 22

years of service).

Yrs	Base Pay +	BAQ	+ BAS		Annual Salary
21	($4579.50	+ $780.30	+ $142.46)	x 12 =	$ 66,027.12
22	($5355.60	+ $809.70	+ $142.46)	x 12 =	$ 75,693.12
23	($5355.60	+ $809.70	+ $142.46)	x 12 =	$ 75,693.12
24	($5536.80	+ $809.70	+ $142.46)	x 12 =	$ 77,867.52
25	($5536.80	+ $809.70	+ $142.46)	x 12 =	$ 77,867.52
26	($5808.60	+ $809.70	+ $142.46)	x 12 =	$ 81,129.12
				TOTAL	$ 454,277.52

The 1994 Navy Times pay chart

Figures include a 2.2 percent pay raise effective Jan. 1, 1994. The bill granting the raise is nearing final approval by Congress. President Clinton has said he will sign it. The raise applies to basic pay, Basic Allowance for Quarters and Basic Allowance for Subsistence.

Years of service

Grade	<2	2	3	4	6	8	10	12	14	16	18	20	22	24	26
Commissioned officers															
O-10	6821.60	7040.70	7040.70	7040.70	7040.70	7311.00	7311.00	7716.00	7716.00	8267.70	8267.70	8821.50	8821.50	8821.50	9371.10
O-9	6027.90	6185.70	6317.40	6317.40	6317.40	6478.20	6478.20	6747.60	6747.60	7311.00	7311.00	7716.00	7716.00	7716.00	8267.70
O-8	5459.70	5622.50	5756.70	5756.70	5756.70	6185.70	6185.70	6478.20	6478.20	6747.60	7040.70	7311.00	7491.30	7491.30	7491.30
O-7	4536.60	4845.00	4845.00	4845.00	5062.20	5062.20	5355.60	5355.60	5623.50	6185.70	6611.10	6811.10	6811.10	6811.10	6811.10
O-6	3362.40	3684.20	3936.30	3936.30	3936.30	3936.30	3936.30	3936.30	4070.10	4713.60	4954.20	5062.20	5355.60	5536.80	5536.60
O-5	2689.20	3157.50	3375.90	3375.90	3375.90	3478.20	3665.40	3911.10	4203.90	4444.50	4579.50	4739.40	4739.40	4739.40	4739.40
O-4	2266.50	2760.30	2944.50	2944.50	2999.10	3131.40	3345.00	3533.10	3684.20	3856.50	3962.70	3962.70	3962.70	3962.70	3962.70
O-3	2106.30	2355.30	2517.90	2785.80	2919.00	3023.70	3187.50	3345.00	3427.20	3427.20	3427.20	3427.20	3427.20	3427.20	3427.20
O-2	1836.90	2005.80	2410.20	2491.20	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80	2542.80
O-1	1594.80	1659.90	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80	2005.80
Officers with more than 4 years' active duty as enlisted or warrant officer															
O-3E	0.00	0.00	0.00	0.00	2785.80	2919.00	3023.70	3187.50	3345.00	3478.20	3478.20	3478.20	3478.20	3478.20	3478.20
O-2E	0.00	0.00	0.00	0.00	2491.20	2542.80	2625.50	2760.30	2856.20	2944.50	2944.50	2944.50	2944.50	2944.50	2944.50
O-1E	0.00	0.00	0.00	0.00	2005.80	2143.20	2222.10	2302.50	2382.60	2491.20	2491.20	2491.20	2491.20	2491.20	2491.20
Warrant officers															
W-5	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	3662.70	3801.60	3911.40	4076.10
W-4	2146.20	2302.50	2302.50	2355.30	2462.40	2570.70	2678.70	2856.20	2999.10	3104.40	3187.50	3290.40	3400.50	3536.40	3645.40
W-3	1950.60	2115.90	2115.90	2143.20	2168.10	2326.80	2462.40	2542.80	2623.50	2701.80	2785.80	2894.40	2999.10	2999.10	3104.40
W-2	1705.50	1848.30	1848.30	1902.00	2005.80	2115.90	2196.30	2276.70	2355.30	2438.10	2517.90	2597.10	2701.80	2701.80	2701.80
W-1	1423.20	1632.00	1632.00	1768.20	1848.30	1827.50	2005.80	2058.90	2168.10	2248.80	2326.80	2410.20	2410.20	2410.20	2410.20
Enlisted members															
E-9	0.00	0.00	0.00	0.00	0.00	0.00	2496.90	2552.70	2610.60	2670.60	2730.30	2783.40	2829.20	3043.20	3214.20
E-8	0.00	0.00	0.00	0.00	0.00	2093.70	2153.70	2210.40	2267.70	2327.70	2381.10	2439.60	2582.70	2697.90	2870.40
E-7	1461.60	1578.00	1636.20	1693.80	1751.40	1807.20	1865.10	1923.30	2010.30	2067.30	2124.60	2152.20	2296.80	2411.10	2582.70
E-6	1257.60	1370.70	1427.70	1486.60	1544.40	1599.90	1658.70	1744.20	1796.50	1857.00	1865.20	1865.20	1865.20	1865.20	1865.20
E-5	1103.40	1201.20	1258.70	1314.30	1401.00	1458.00	1515.60	1571.40	1599.90	1599.90	1599.90	1599.90	1599.90	1599.90	1599.90
E-4	1029.30	1067.20	1151.10	1236.90	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60	1266.60
E-3	969.90	1023.00	1083.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80	1105.80
E-2	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30	933.30
E-1	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80	832.80

E-1 with less than 4 months —$ 770.10

Note: Basic pay is limited to $5,016.60 per month (1) at the VI of the executive pay schedule.

4PC0

Basic Allowance for Quarters

Grade	Dependents Without Full	Dependents Without Partial	With
O-10	736.50	50.70	899.10
O-9	736.50	50.70	899.10
O-8	736.50	50.70	899.10
O-7	736.50	50.70	899.10
O-6	670.20	39.60	809.70
O-5	645.30	33.00	780.30
O-4	596.20	26.70	687.90
O-3	479.40	22.20	569.40
O-2	360.10	17.70	456.30
O-1	320.10	13.20	434.40
O-3E	517.50	22.20	611.70
O-2E	440.10	17.70	552.00
O-1E	378.30	13.20	510.90
W-5	637.50	25.20	663.90
W-4	539.70	25.20	608.70
W-3	453.60	20.70	558.00
W-2	402.60	15.90	513.30
W-1	357.20	13.80	444.00
E-9	443.40	18.60	564.10
E-8	407.10	16.30	535.50
E-7	347.40	12.00	500.10
E-6	314.70	9.90	462.30
E-5	280.10	8.70	415.50
E-4	252.30	8.10	361.50
E-3	247.80	7.80	336.30
E-2	201.30	7.20	320.10
E-1	179.10	6.90	320.10

Basic Allowance for Subsistence

Officers (including commissioned officers earned pay grades)	$ 9142.46 a month	
Enlisted	<4 mos.	Others
Rations in kind not available	$7.06	$7.67
Cash allowance granted (because of mess separation)	$6.26	$6.86
Emergency conditions where no government messing is available	$5.39	$10.16

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No. 94-174

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In the Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW MITCHELL, JR. AND GEORGE A. SEAVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioners' convictions invalid under the Due Process Clause.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Andrew Mitchell, Jr., Pet. App. 1a-62a, is reported at 39 M.J. 131. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 63a-131a, is reported at 37 M.J. 903. The order of the Court of Military Appeals in the case of petitioner George A. Seaver, Pet. App. 132a-133a, is unreported. The decision of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 134a-137a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Mitchell* was entered on April 29, 1994.

The judgment of the Court of Military Appeals in *United States* v. *Seaver* was entered on June 21, 1994. A joint petition for a writ of certiorari was filed on July 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

1. The Judge Advocate General of the Navy is the principal legal officer for that military service. He assigns other commissioned officers to serve as judges of the Navy-Marine Corps Court of Military Review. In accordance with Department of the Navy regulations, he also submits fitness or efficiency reports respecting those officers. Navy regulations require preparation of fitness reports for all of the Navy's commissioned officers. The reports describe an officer's performance and conduct during the reporting period and form a basis for determining his retention, promotion, and future assignments. A typical report consists of a checklist evaluation in several key areas of performance, a narrative summary of the officer's accomplishments during the reporting period, and a comparative ranking with other officers of the same pay grade in the same organization. Pet. App. 5a-7a.

During the pendency of petitioners' appeals, the Assistant Judge Advocate General (AJAG) for Military Justice routinely prepared draft fitness reports for judges sitting on the Navy-Marine Corps Court of Military Review. He then submitted the draft reports to the Judge Advocate General for his review and approval. Each judge had the opportunity to provide information and comments for incorporation into his fitness report before its preparation. At the time, the AJAG (typically a Marine Corps colonel) would also be ranked against any

other Marine Corps colonels assigned as military appellate judges. Pet. App. 7a-8a.

2. Petitioner Mitchell, a member of the United States Navy, pleaded guilty at a special court-martial to wrongful disposal of military property, theft of property of the United States, indecent assault, and using indecent language, in violation of Articles 108, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 908, 921, and 934. He was sentenced by a military judge to partial forfeitures of pay, reduction in grade, and a bad-conduct discharge. The findings and sentence were approved by the convening authority. Following a general court-martial tried overseas, petitioner Seaver, also a member of the United States Navy, was convicted on seven counts of sodomy with a child, and five counts of indecent acts with a child, in violation of Articles 125 and 134 of the UCMJ, 10 U.S.C. 925 and 934. He was sentenced by a military judge to confinement for 18 years, total forfeitures of pay and allowances, and dismissal from the service. The convening authority approved the findings and sentence. Pet. 4-5; Pet. App. 2a.

The Navy-Marine Corps Court of Military Review affirmed petitioners' convictions. Pet. App. 63a-131a, 134a-137a. In the case of Mitchell, the Court of Military Appeals granted plenary review and rejected his contention that the Judge Advocate General's preparation of military judges' fitness reports deprived those judges of their independence and thereby rendered his conviction invalid under the Due Process Clause. Pet. App. 1a-62a. In the case of Seaver, who raised the same issue in a separate proceeding, the Court of Military Appeals sum-

marily affirmed on the basis of its decision in Mitchell's case. Pet. App. 132a-133a.[1]

ARGUMENT

Petitioners contend that military judges who are regularly evaluated by the Judge Advocate General lack the independence necessary to satisfy the requirements of the Due Process Clause. Petitioners do not allege that the military judges who reviewed their convictions were or appeared to be biased. They nevertheless contend that the appellate review process violates constitutional requirements, because a "reasonable observer could find that the Judge Advocate General * * * [has] interests within the military justice system which are opposed to those of the petitioners and other military servicemembers whose cases are being reviewed." Pet. 17. According to petitioners, military judges may consequently skew their decisions in the government's favor to receive favorable fitness reports.

Petitioners' contention is inconsistent with this Court's decision in *Weiss* v. *United States*, 114 S. Ct. 752 (1994), which rejected a due process challenge to the independence of military judges based on their service without a fixed term of office. The Court repeated its familiar admonition that the application of due process principles in the military context must take into account the special nature of military service, and it reiterated that constitutional tests developed for civilian life are not necessarily applicable to military institutions. 114

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[1] Unlike Mitchell, Seaver did not present the issue in his appeal to the Navy-Marine Corps Court of Military Review. See Pet. App. 134a-137a.

S. Ct. at 760-761. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).[2]

More fundamentally, the Court's decision in *Weiss* expressed specific approval of the military justice hierarchy that Congress has established. Military institutions operate under a formal structure in which superior officers review the work of their subordinates. In the case of the military justice system, Congress has created a structure that enhances the independence of military judges while taking account of the military's organizational needs. As the Court explained:

> Article 26 [of the UCMJ] places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. 10 U.S.C. § 826. Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence.

114 S. Ct. at 762. The Judge Advocate General's authority over military judges includes the responsibility to prepare standard military fitness reports for those judges. Petitioners' suggestion (Pet. 6) that the preparation of those reports undermines the indepen-

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[2] Petitioners' reliance (Pet. 6-8) on decisions such as *Tumey* v. *Ohio*, 273 U.S. 510 (1927), which invalidated a state practice allowing a town mayor to try criminal cases and to receive compensation based on the amount of the fines he collected, is accordingly misplaced. Indeed, the situation in *Tumey* bears scant similarity to the situation faced here. In *Tumey*, the mayor had a "direct, personal, pecuniary interest in convicting the defendant who came before him for trial." 273 U.S. at 523. By contrast, the practice of subjecting military judges to standard military fitness reviews poses, at most, only a highly speculative prospect for compromising the judges' independence.

dence of military judges is not persuasive. The Due Process Clause does not mandate the same measure of autonomy for military judges (or state judges) that Article III provides to federal judges. Military judges are military officers, and they remain subject to standard performance evaluations. As this Court explained in *Weiss*:

> Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial, we believe Congress has achieved an acceptable balance between independence and accountability.

114 S. Ct. at 762. The Court also noted that the military justice system is overseen by the civilian Court of Military Appeals. *Ibid.* That court "has demonstrated its vigilance in checking any attempts to exert improper influence over military judges" by limiting the criteria that a Judge Advocate General may use in rating military judges. *Ibid.* See *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), cert. denied, 114 S. Ct. 917 (1994); *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991).

The military justice system contains additional safeguards designed to prevent the type of improper influence that petitioners fear. The Navy, like the other military services, has adopted regulations to ensure that only the most qualified and experienced officers will be selected as military judges. Once selected, military judges are subject to the ABA Code of Judicial Conduct, which requires them to uphold the independence and integrity of their courts. A military judge may be challenged for cause whenever his impartiality may reasonably be questioned. Rule for Courts-Martial 902,

Manual for Courts-Martial, United States, 1984. In addition, Article 37(a) of the UCMJ, 10 U.S.C. 837(a), expressly prohibits any attempt to coerce or influence a military tribunal. Any officer who violates Article 37 is subject to criminal prosecution under Article 98 of the UCMJ, 10 U.S.C. 898. A military judge who is made the target of such improper influence can file a formal complaint to the Secretary of the Navy under Article 138 of the UCMJ, 10 U.S.C. 938. In light of those protections, the current method for evaluating the performance of appellate military judges does not present a serious systemic threat to the fairness—or the appearance of fairness—of the appeals process.[3]

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[3] The Court of Military Appeals noted some "dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system." Pet. App. 37a. That court properly concluded, however, that its appellate powers did not give it license to legislate changes to the routine functioning of the fitness report system, which is the responsibility of the Judge Advocate General of the Navy. Pet. App. 37a-38a. The Judge Advocate General has taken steps to improve the fitness report procedure for military judges. For example, the Navy AJAG for military justice will no longer be ranked alongside other officers serving as judges on the court of military review. Additionally, because the officer currently serving as the Navy AJAG for military justice has a number of cases pending before the court of military review in which he presided as military judge, he has recused himself from preparing the draft fitness reports for the judges of the court. The AJAG is also considering proposals to develop alternative methods of preparing fitness reports for military judges. Finally, the Navy Judge Advocate General has proposed revisions to the fitness report regulations to define appropriate and specific criteria for evaluating military judges. Those matters will receive appropriate scrutiny from the Court of Military Appeals in future cases. See Pet. App. 38a n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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